91-170

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

HAZEL HILL,

Petitioner,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE; MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; O.H. SIMMONS, HUGH GIBSON, WILLIAM G. LEONARD, AND MARY BRYANT, COMMISSIONERS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case arising under Title VII of the Civil Rights Act of 1964, a defendant's assertion of pervasive incompetence constitutes a legitimate nondiscriminatory reason sufficient to rebut the mandatory inference of discrimination arising from a plaintiff's prima facie case of disparate treatment?

2. Whether, in conflict with this Court's ruling in *Bazemore v. Friday* as well as the Second, Ninth and District of Columbia Circuits, the Fifth Circuit erroneously held that a Title VII defendant can rebut a statistically significant showing of racial disparity by merely alleging, without any supporting evidence, that the plaintiff's statistics failed to account for potentially relevant factors that might explain the disparity?

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OPINIONS BELOW

The December 13, 1990 opinion of the United States Court of Appeals for the Fifth Circuit is reported at 918 F.2d 1233 (5th Cir. 1990) and is reprinted in the Appendix to this Petition ("App.") at 1a. The May 1, 1989 memorandum opinion of the district court (per Magistrate Britt R. Singletary) is unreported and is reprinted in the Appendix to this Petition at 29a.

JURISDICTION

The Fifth Circuit entered an order denying rehearing on April 15, 1991. App. 65a. On July 8, 1991, Justice O'Connor extended the time for filing the Petition for Certiorari in this case to July 29, 1991. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, which provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.
>
> (b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Petitioner Hazel Hill is a black woman seeking redress under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for racial discrimination by the Mississippi State Employment Service (MSES). Although this case arises in the context of discriminatory employment referrals, it raises important questions about the order and nature of proof in virtually all cases brought under Title VII and other anti-discrimination statutes.

A. Factual Background

In the hope of bettering her life by obtaining a job as a cashier, waitress, or cocktail waitress, Petitioner Hill registered in April 1982 with the local office of the MSES. MSES is a state-run "labor exchange" that matches qualified applicants with available jobs. On an initial visit, Hill

completed an application indicating her work experience and occupational preferences. This information was subsequently recorded on MSES Form 511, which translated the jobs for which Hill was considered qualified into 9-digit Dictionary of Occupational Titles (DOT) codes.[1] When an applicant such as Hill requests a referral, MSES searches the job orders within the applicant's code. When an employer places a job order seeking referrals, MSES searches the relevant codes for qualified candidates.[2] *Hill v. Mississippi State Employment Service*, 918 F.2d 1233, 1234-35 (5th Cir. 1990); App. 3a.

Not infrequently an employer requests several candidates to interview for a single opening. Often, there are more than enough qualified candidates for a given job vacancy, leaving MSES workers broad discretion to select which applicants to refer. MSES would, however, often "short" the order by sending fewer than the requested number of applicants. Additionally, MSES would often refer candidates "out of code" – those whose qualifications or preferences did not match the job order. 918 F.2d at 1235; App. 4a.

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[1] Hill was classified for cashier, 211-492-014, and waitress, 311-477-030, positions.

[2] These procedures were set out in the *Employment Service Manual* (ESMII), a publication of the U.S. Department of Labor. MSES is a division of the Mississippi Employment Security Commission, which itself is a member of a network of state employment services created by the Wagner-Peyser Act, 29 U.S.C. § 49. Under the Act, in order to receive federal funds, member agencies must comply with the policies established by the United States Employment Service.

During the period from April 1, 1982 to April 14, 1983, when Hill sought referrals, MSES referred scores of white job seekers to numerous positions for which Hill qualified. From January 12 until March 18, 1983, for example, a job order was placed by a department store for cashiers – a position for which Hill was qualified and for which she had consistently expressed a preference. Hill visited the MSES offices to request referrals no fewer than *31 times* during the period the order was open. 918 F.2d at 1235 n.5; App. 6a. The job opportunity was well known in the MSES office, and MSES interviewers with whom Hill met during the period were aware of the opening. *See* Trial Transcript at 635-36. Neither Hill nor *any other* of the 163 black candidates coded as cashiers were referred. Instead, 22 whites were referred for the job, 10 of them out of code. Several of the white candidates did not satisfy – as Hill undeniably did – the employer's education and experience requirements.[3]

In another instance, Hill was sent to a Ramada Inn for a chambermaid position, only to learn upon arriving that the Inn had also placed with the MSES a job order for a waitress, for which Hill was not referred. In yet another instance, on March 10, 1983, a day on which Hill sought and was denied other waitress referrals, Shirley Garris, a white woman employed by Hill's trial counsel,[4] sought

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[3] According to the Magistrate, 3 of these referred white candidates lacked even the minimal experience required and 5 lacked the educational minima. App. 36a.

[4] Two days earlier Hill had filed a complaint with the E.E.O.C. alleging the racially discriminatory referrals.

and received from the same MSES office *two* waitress referrals, one of which had been open for 25 days and the other for more than a week. Neither job order requested special skills or experience of any kind.[5] 918 F.2d at 1235-36 & n.5; App. 6a-7a; *see also* App. 36a-40a (district court findings of fact).

On a number of occasions, job orders were "shorted," while Hill and other qualified black applicants were ignored. For example, a December 1982 order for bank tellers requested six referrals. Five white women were referred, all out of code and all lacking the requisite experience. Hill, experienced as a bookkeeper and coded for the position, was not referred.[6] Similar results followed a February 1983 job order for a cashier in a local convenience store. Despite the employer's request for ten referrals, MSES sent only five candidates, four of them white. Hill, who was qualified, was not referred. When a position opened for an emergency room technician, Hill's experience working in a hospital and the employer's request for five referrals were disregarded. MSES sent a single white woman – again out of code. App. 36a-40a.

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[5] In another instance, occurring after April 14, 1983, Hill specifically requested a referral from the MSES as a cashier at the County Market grocery. She was told no openings existed, but visited the store on her own initiative. There she was informed that an opening *did* exist, but that she would need an MSES referral. While Hill was still inside the store, a white applicant appeared with an MSES referral and was hired on the spot.

[6] The MSES interviewer who referred Hill to positions as a chambermaid and counter attendant conceded that she knew of the teller position and had referred other candidates.

The few referrals Hill received from MSES were for jobs stereotypical for black women in the Deep South – making beds and serving fried chicken. She received two referrals as a hotel chambermaid, as well as referrals as a "counter attendant" in a fried chicken restaurant, and as a "cashier" at Kentucky Fried Chicken. The latter was her only "cashier" referral (it was already filled when she arrived for her interview); she received no waitress referrals.

B. District Court Proceedings.

After exhausting administrative remedies, Hill filed suit in the United States District Court for the Southern District of Mississippi on September 2, 1983. She alleged disparate treatment and disparate impact violations of Title VII, 42 U.S.C. § 2000e *et seq.* The district court had jurisdiction pursuant to 42 U.S.C. § 2000e-5. By consent of the parties and pursuant to 28 U.S.C. § 636(c), the case was tried before a magistrate with direct appeal to the Court of Appeals.

In addition to evidence of the specific instances of disparate treatment described above, Hill introduced substantial statistical and quantitative evidence. During the period when Hill sought referrals, MSES processed 191 job orders within Hill's preferred occupational codes: 6 for cocktail waitress, 39 for waitress, and 146 for cashiers. Each of the 21 candidates referred to cocktail waitress jobs for which Hill was qualified was white, as were 71% of the waitress referees, and 68.8% of the cashier referees. During this time, the pool of applicants was, on average, 58.2% white. Using all information available from MSES records, Hill's statistical expert demonstrated through multivariate regression analysis that the referral patterns *for the jobs which Hill was seeking* would have been

extremely unlikely to have occurred in the absence of racial discrimination.[7] Hill's expert in personnel management further demonstrated that MSES processed 87 job orders within Hill's preferred codes to which *no black applicants* were referred and that 25 of these job orders contained referrals of white candidates whose qualifications were manifestly inferior to those of Hill. Memorandum Opinion, App. 29a, 40a-45a (summarizing evidence).

Based on particular incidents of discrimination documented by Hill – but not on Hill's statistical showing – the presiding magistrate found that Hill had established a prima facie case of disparate treatment as defined by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and as adapted to employment agency referrals by the Fifth Circuit in *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir. 1983), *cert. denied*, 464 U.S. 991 (1984).[8] *See* App. 54a-55a.

MSES conceded that the particular instances of disparate treatment documented by Hill had occurred. MSES

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[7] Dr. Jerry Himmelstein, Hill's expert, found standard deviations of 4.83, 8.78, and 3.41 for cocktail waitress, waitress, and cashier, respectively. Statistical tables indicate that the probability of a disparity measuring 8.78 standard deviations from the racially neutral norm being attributable to random chance is less than one in one *billion*.

[8] In *Pegues*, the Court held that a *prima facie* case is made out in an individual disparate treatment case when a plaintiff proves, by a preponderance of the evidence, that the plaintiff (1) is a member of a protected group (2) has applied for and been coded for occupations for which the office is making referrals (3) has failed to secure a referral and (4) a non-member of the protected group is referred.

argued, however, that these instances were somehow attributable to the "inherent" or "general inefficiency" of MSES's "system." In essence, MSES pled incompetence. Calling the question "clouded" by the fact that "MSES d[id] not point to a *particular reason* justifying a disparity," the magistrate noted that MSES had claimed it was hampered by "(1) employee error or oversight, (2) inefficient communication among staff members about active job orders, (3) inability to contact applicants, (4) applicant's preferences, and (5) other racially neutral problems." *Id.* MSES made no effort to demonstrate that those "inherent defects" contributed to the particular instances of disparate treatment detailed by Hill.[9] App. 55a. Based on this showing, the magistrate concluded that MSES had met its rebuttal burden of articulating a "legitimate nondiscriminatory reason" for the disparate treatment of Hill. App. 55a-56a. *See Burdine*, 450 U.S. at 253-54.

The magistrate then found that Hill had not carried her burden of proving that MSES's explanation was pretextual. To evaluate Hill's "pretext case," the magistrate looked only to the statistical evidence. That evidence was found to be "flawed and insufficient to prove pretext," on the ground that it omitted two factors that the court deemed to be of critical importance to referral decisions – applicants' experience and education.[10] App. 57a-58a.

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[9] The record forecloses such a showing in any event. Hill was in frequent contact with the office, and the MSES employees with whom she dealt had specific knowledge of jobs for which she was qualified, but not referred.

[10] The defendants could not plausibly claim, as the courts below erroneously seem to have concluded, that work

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In reaching this result, the magistrate took no note of MSES's explicit concession that Hill's analysis would have shown statistically significant levels of discrimination *even if* the omitted variables were included – the omissions affected only the magnitude of the disparity.[11] Nor did the magistrate evaluate the entirety of Hill's evidence in determining whether pretext was shown.

The magistrate also ruled that Hill's disparate impact challenge to the MSES referral system had to be rejected

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experience was *omitted* from Hill's statistical analysis. *See Pegues v. Mississippi State Employment Service*, 699 F.2d at 764 ("Experience was a primary consideration in the [MSES] coding procedures").

[11] MSES readily conceded that plaintiff's expert's analysis was the best possible given the available data – all of which was in MSES' control. Apparently the magistrate did not grasp the meaning of statistical significance. If a regression analysis is found to be statistically significant, that finding necessarily implies that the odds that the observed discrimination was produced by random or chance factors are so low that the possibility can be discounted. *See Castenada v. Partida*, 430 U.S. 482, 496-97 n.17 (1977); *Pegues*, 699 F.2d at 768 n.9.

MSES made no attempt to introduce any regression data of its own, nor did it attempt to introduce any evidence whatever to support its implicit claim that the white workers being referred to cocktail waitress and cashier jobs were in fact more highly educated or experienced. Circuit Courts and leading commentators have interpreted this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), as holding this sort of "mere conjecture or assertion" in the face of statistical evidence is legally insufficient to undermine an inference of discrimination. *Palmer v. Schultz*, 815 F.2d 84, 101, 106 (D.C. Cir. 1987). *See also* D. Baldus & J. Cole, *Statistical Proof of Discrimination* vii (1986 Supp.).

because of the purported flaws in Hill's statistical analysis. App. 58a.

C. The Court of Appeals Proceeding

The Fifth Circuit affirmed the district court's ruling, with Judge Rubin dissenting. The majority held that an employer's assertion of pervasive incompetence could serve as a "legitimate nondiscriminatory explanation" sufficient to rebut a prima facie case of disparate treatment. The panel majority was "trouble[d]" by the "likely" prospect that "general inefficiency" would become a "shield for almost any employer – including a discriminating one," and by the quality of the "evidentiary support" for "MSES's systemic problems." 918 F.2d at 1239; App. 14a. The majority nonetheless concluded that "MSES does not offer . . . an utter lack of specifics" and that it would be "the height of unfairness to infer . . . discriminatory animus" from "an employer's detailed and documented inefficiency." 918 F.2d at 1239; App. 15a.[12]

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[12] In dissent, Judge Rubin took the majority to task for "not even attempting to define what is meant by a 'legitimate nondiscriminatory reason,' " insisting that those words must take their meaning from the purposes of the Fair Employment Practices Act. Noting that this Court has consistently embraced the premise that "efficient workmanship" and "neutral employment and personnel decisions" go hand in hand, Judge Rubin maintained that a "legitimate reason" must be more than "non-criminal"; that it must be "justifiable." MSES claims of "neutral inefficiency were belied by the "evidence [showing] that MSES system is inefficient only when it fails to refer black employees." App. 20a-25a.

The Court of Appeals went onto hold that Hill's statistics failed to demonstrate that MSES's "incompetence" defense was pretextual. The court acknowledged that, as MSES conceded, Hill's statistical analysis was the "best possible" given the available data. 918 F.2d at 1237 n.9; App. 9a. The court also acknowledged MSES's concession that Hill's regression analyses would show statistically significant levels of race-based disparity even if the omitted variables were included in the analysis. *Id.* at 1237; App. 10a-11a. The court nonetheless concluded that the omission of the variables destroyed the probative worth of the analyses. *Id.* at 1240; App. 17a-18a. The unspoken premise of the court's ruling was that the omitted qualifications were less likely to be present in black than in white applicants – an assumption without any support in the record.

The appellate court also summarily rejected Hill's disparate impact allegations. Because Hill's statistical evidence did not demonstrate pretext, the court concluded, that evidence could not support a disparate impact case. 918 F.2d at 1240; App. 18a.

Judge Rubin dissented. He would have held that pervasive incompetence cannot be considered a legitimate nondiscriminatory explanation under *McDonnell Douglas* and *Burdine*. Judge Rubin also rejected the "incompetence" defense as applied because MSES had "not shown a single instance . . . in which the failure to refer employees to jobs resulted from difficulty in reaching Hill – or from overwork – or red tape." 918 F.2d at 1243; App. 25a. Pointing out that "inefficiency is racially neutral [and] cannot in itself account for racial discrimination," he also would have held that Hill's statistically

significant showing of discrimination proved pretext. *Id.* at 1241; App. 20a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER AN EMPLOYER'S ASSERTION OF PERVASIVE INCOMPETENCE CAN CONSTITUTE A LEGITIMATE BUSINESS JUSTIFICATION SUFFICIENT TO REBUT THE LEGALLY MANDATORY INFERENCE OF DISCRIMINATION ARISING FROM A PLAINTIFF'S PRIMA FACIE CASE OF DISPARATE TREATMENT.

This case presents an important question of Title VII law that has not been, but should be, decided by this Court: whether a defendant's assertion of pervasive incompetence constitutes a legitimate nondiscriminatory business justification sufficient to defeat the legally mandatory inference of discrimination arising from a plaintiff's prima facie showing of disparate treatment.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court established a "careful framework" for adjudicating claims of disparate treatment under Title VII. *See Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1796 (1989) (O'Connor, J., concurring in the judgment). A plaintiff establishes a prima facie case by showing that: (i) she is a member of a group protected by Title VII; (ii) she is qualified for the position she seeks; (iii) she has failed to secure the position; and (iv) the position was given to someone not a member of a protected group. This showing creates a "legally mandatory

inference of discrimination" unless rebutted by the defendant. *Burdine*, 450 U.S. at 255 n.10. To rebut a prima facie case, the defendant must "articulate some legitimate nondiscriminatory reason" for the apparent discrimination. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff then has the opportunity to demonstrate that the defendant's proffered reasons were "pretextual." *Id.*

Since *McDonnell Douglas*, this Court has been steadfast in defining "legitimate nondiscriminatory reasons" as "rational and neutral *business* justification[s]." 411 U.S. at 806 n.21 (emphasis added). Noting that "efficient workmanship" through fair employment practices is an important goal of Title VII, the *McDonnell Douglas* Court required the defendant to articulate a reason *"which could fairly be recognized as a reasonable basis* for its refusal to hire." 411 U.S. at 802-03 (emphasis added).[13] Thus, even as the Court held in *McDonnell Douglas* that the employer's proffered reason – the plaintiff's participation in illegal and disruptive activities directed at the employer's business – was legally sufficient, it was unwilling to declare that a plaintiff's criminal record would always constitute a *"rational and neutral business justification"* sufficient to count as a "legitimate reason" for disparate treatment. *Id.* at 806 n.21 (emphasis added).

Similarly, a unanimous Court in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), while holding that an employer has no duty under Title VII to *maximize* the number of minority applicants, reiterated that the firm's

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[13] *See also* Beard, *Title VII and Rule 301: An Analysis of the Wards Cove and Atonio Decisions*, 23 Akron. L. Rev. 105 (1989).

asserted hiring practices must "be *reasonably related* to the achievement of some legitimate goal." 438 U.S. at 578 (emphasis added). In *Dothard v. Rawlinson*, then-Justice Rehnquist explained that *McDonnell Douglas* imposes a "burden to articulate *job-related* reasons" to rebut a prima facie case. 433 U.S. 321, 331 (1977) (Rehnquist, J., concurring). *Cf. also Price Waterhouse v. Hopkins*, 109 S. Ct. at 1804 (O'Connor, J., concurring in the judgment) (to rebut showing of discrimination, defendant must demonstrate "sufficient *business reasons*" (emphasis added)).

Prior to this case, the courts of appeals had likewise uniformly understood that legitimate nondiscriminatory reasons in the disparate treatment context should be job-related reasons. *See, e.g., Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 799 (5th Cir. 1982); *Jones v. International Paper Co.*, 720 F.2d 496 (8th Cir. 1983); *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.), *cert. denied*, 469 U.S. 846 (1984); *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1312 (2d ed. 1983); *id.* at 480-81 (5-year Cumulative Supp. 1989).

The Fifth Circuit's ruling in the present case deviates sharply from this well-established principle. For the first time, a Circuit has held that a Title VII defendant can rebut the legally mandatory inference of discrimination arising from a prima facie case by advancing a reason for a disparate treatment wholly unrelated to the defendant's business interests or needs. Plenary review of this decision is urgently needed for several reasons.

First, the novel "incompetence" defense recognized by the Fifth Circuit will re-order outcomes in Title VII

cases in a manner flatly inconsistent with the intent of Congress. As even the "troubled" majority of the divided Fifth Circuit panel acknowledged, the "incompetence" defense can look forward to a flourishing career as "shield for almost any employer – including a discriminating one." 918 F.2d at 1239; App. 14a. In effect, the Court of Appeals has imposed an unattainable standard for proving discriminatory intent. Discriminating employers can, at the negligible cost of "articulating" pervasive incompetence, impose burdens on discrimination's victims so prohibitive as to preclude victory for even plaintiffs who most merit recovery.[14]

The Fifth Circuit's recognition of an "incompetence" defense also flies in the face of the bedrock congressional judgment that Title VII should eradicate all "artificial, arbitrary and unnecessary barriers to employment." *McDonnell Douglas*, 411 U.S. at 806 (quotations omitted). As this Court has repeatedly reaffirmed, "Congress addressed the thrust of the Act to the consequences of

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[14] Hill, an individual plaintiff with no resources and represented by a legal services organization, was told – after presenting testimony by three expert witnesses and using all the data the defendant could provide – that MSES' attestations of racially neutral inefficiency could be rebutted by "properly analyzed and compiled statistics." 918 F.2d at 1239 n.11; App. 14a.

employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).[15]

The Fifth Circuit's "incompetence" defense immunizes precisely the kind of "artificial, arbitrary, and unnecessary" barrier that Congress enacted Title VII to eradicate.[16] An obvious tension exists between the legal rule established by the Fifth Circuit in this case and the general principles governing disparate impact cases under Title VII. At a minimum, this tension demonstrates the need for clarification as to the legitimacy of the "incompetence" defense in disparate treatment cases, and

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[15] In the disparate impact context, this Court has recently made clear that

> [t]he touchstone of this inquiry is a reasoned review of the employer's justification. . . . A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.

Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2126 (1989). Were an employer to raise "incompetence" as a defense to a prima facie case of disparate impact, *Wards Cove* would plainly dictate a judgment for the plaintiff as a matter of law. That a defendant in a disparate treatment action can, at least in the Fifth Circuit, avoid liability by an identical defense is incongruous.

[16] Recognition of the incompetence defense removes the " 'spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices,' " and thereby undermines the basic deterrent purposes of Title VII. *See Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J. concurring) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

the proper relation between the disparate treatment and disparate impact analytical frameworks generally.[17]

Second, permitting an "incompetence" defense jeopardizes the orderly, efficient adjudication of Title VII cases. *See generally Price Waterhouse v. Hopkins*, 109 S. Ct. at 1798 (O'Connor, J. concurring). As Justice O'Connor has explained, "the entire purpose of the *McDonnell Douglas* prima facie case is to *compensate* for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1801 (O'Connor, J., concurring in the judgment) (emphasis added). Because direct evidence is typically not available to Title VII plaintiffs, an individual plaintiff is entitled to a "legally mandatory inference of discrimination" upon proving that the most obvious nondiscriminatory

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[17] In setting forth the basic definition of the defendant's rebuttal case in the disparate impact context, the Court specifically incorporated the *McDonnell Douglas* definition of the employer's burden in the disparate treatment context. *See Albermarle Paper Co. v. Moody*, 422 U.S. at 425 (quoting *McDonnell Douglas*, 411 U.S. at 801).

Some lower courts have held that a defendant's proffered explanation for disparate treatment is insufficient as a matter of law if that explanation would fail as a defense to a disparate impact action. For example, in *Easley v. Anheuser-Busch, Inc.*, 572 F. Supp. 402, 414 (E.D. Mo. 1983), *aff'd in relevant part*, 758 F.2d 251 (8th Cir. 1985), the court rejected the defendant's proffered disparate treatment rebuttal argument that the plaintiff was not hired because she failed an employment test. The court held that the proffered explanation was insufficient as a matter of law because the test would not have survived scrutiny under disparate impact analysis.

explanations do not account for the disparate treatment at issue. *See Burdine*, 450 U.S. at 255 n.10.

The Fifth Circuit's incompetence defense vitiates the crucial policy judgment underlying the *McDonnell Douglas/Burdine* analytical framework. It allows the defendant to rebut a prima facie case by mere articulation of the argument that the plaintiff was the unintended victim of an arbitrary or artificial barrier. This defense effectively annihilates the presumption. Every defendant will be able to argue that disparate treatment of a plaintiff was simply a mistake. If that "explanation" defeats the inference of discrimination arising from a prima facie case, plaintiffs will effectively bear all the risk of erroneous litigation outcomes caused by plaintiffs' general inability to obtain direct evidence of discrimination.

The ruling below also threatens to revolutionize the second stage of the *McDonnell Douglas/Burdine* order of proof, in which the defendant must articulate a legitimate nondiscriminatory explanation in order to "sharpen[] the inquiry" into the real reason for disparate treatment of the plaintiff and to afford the plaintiff "a full and fair opportunity to show pretext." *Burdine*, 450 U.S. at 255. Instead of focusing the inquiry narrowly on whether disparate treatment resulted from the particular qualifications of the individual employee or the particular needs of the employer, the incompetence defense forces the individual employee at the pretext stage to undertake what amounts to a full-blown statistical disparate impact analysis of the employer's practices to show that the alleged "incompetence" – which should disadvantage whites and blacks equally – is in fact producing racially discriminatory results. Because, as the majority below

acknowledged, the incompetence defense is readily available to all employers, its recognition threatens to turn most straightforward individual disparate treatment cases into the functional equivalent of broad class-action challenges to systemwide employment practices.

Without direct evidence of discrimination, moreover, even such a showing may not suffice because the plaintiff will be hard put to prove that *overall* incompetence did not cause the *particular* adverse employment decision at issue. At a minimum, the extensive additional burdens imposed on individual plaintiffs may well preclude the vindication of meritorious claims as a result of the difficulty and expense of proving pretext. *See Lanphear v. Prokop*, 703 F.2d 1311, 1316 (D.C. Cir. 1983) (purpose of Title VII proof sequence "is defeated if the defendant is allowed to present a moving target or . . . conceal the target altogether"); *see generally Price Waterhouse v. Hopkins*, 109 S. Ct. at 1801 (O'Connor, J., concurring in the judgment).

Third, the Fifth Circuit's endorsement of a general "incompetence" defense conflicts in principle with the uniform law of other Circuits requiring a specific link between the plaintiff's allegations of discriminatory acts and the defendant's legitimate nondiscriminatory explanation. *Burdine* has been consistently interpreted to require that a defendant's explanation specifically address the particular instances of alleged discrimination raised by the plaintiff. Thus, when a qualified applicant is rejected or a competent employee is dismissed from a job, a Title VII defendant does not meet its responsibility to "explain" its decision by showing that "the odds were against" a candidate's being chosen or by "articulating"

the economic reasons why a reduction in force was necessary. *See Easley v. Anheuser-Bush*, 758 F.2d 251, 259-61 (8th Cir. 1985) (that many applicants applied for job is not a legitimate nondiscriminatory reason for individual plaintiff's rejection); *Impact v. Firestone*, 893 F.2d 1189 (11th Cir.) (holding that defendant's burden is satisfied only by accounting for each act of disparate treatment), *cert. denied*, 111 S. Ct. 133 (1990); *Paxton v. Union National Bank*, 688 F.2d 552, 566 (8th Cir. 1982) (holding that defendant must offer specific reasons for each failure to promote individual black employees, and finding that defendant had, by introducing employment records, articulated a *reason* for every employee's discharge), *cert. denied*, 460 U.S. 1083 (1983); *Cf. Nanty v. Barrows*, 660 F.2d 1327 (9th Cir. 1981) (holding that defendant fails to satisfy its burden unless it articulates a reason which might explain the plaintiff's *actual* rejection). *See generally* B. Schlei & P. Grossman, *supra*, at 1312.

As these decisions recognize, once an individual plaintiff has made a prima facie showing of disparate treatment, that the defendant is generally or "officially" fair-minded, let alone pervasively incompetent, is almost entirely beside the point. *See generally Hazelwood School District v. United States*, 433 U.S. 299 (1977) (holding that evidence of official policy of nondiscrimination was insufficient to carry defendant's production burden). The Fifth Circuit's ruling in the present case is squarely at odds with the animating principles, if not the holdings, of these decisions.

For these three reasons, this Court should review the Fifth Circuit's recognition of the "incomptence" defense.

II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY ITS HOLDING IN *BAZEMORE V. FRIDAY* AND TO RESOLVE THE CONFLICT IN THE CIRCUITS RESPECTING WHAT A TITLE VII DEFENDANT MUST SHOW TO REBUT A STATISTICALLY SIGNIFICANT SHOWING OF RACIAL DISPARITY.

In *Bazemore v. Friday*, this Court held that "a regression analysis that includes less that 'all measurable variables' may serve to prove a plaintiff's case." 478 U.S. at 400. The crucial question, the Court made clear, was whether when omitted "factors were properly organized and accounted for there was no significant disparity between . . . blacks and whites." *Id.* at 403 n.14. The Court overturned the Fourth Circuit's ruling that a statistical analysis in a Title VII case could not constitute probative evidence of discrimination merely because some variables had been omitted from the analysis. *Id.* at 399-400.

In the wake of *Bazemore*, the Courts of Appeals remain confused as to what a defendant must show to rebut a statistically significant showing of race-based disparity in a Title VII case. Without mentioning *Bazemore*, the Fifth Circuit in this case denied *any* probative force to Hill's statistical analyses because they purportedly omitted variables – experience and education – that might explain the observed disparities between black and white job seekers. MSES offered no alternative statistical analyses showing that inclusion of the omitted variables would eliminate the observed racial disparities. Nor did MSES introduce any evidence tending to show that whites were likely to possess the omitted traits in greater measure than were blacks. To the contrary, MSES *conceded* that Hill's regression analysis showing discrimination

retained its statistical significance even if the omitted variables were included. 918 F.2d at 1237; App. 10a-11a.

The Fifth Circuit's holding conflicts directly with well-established law of the District of Columbia Circuit, as well as recent decisions of the Ninth and Second Circuits – all of which have concluded that *Bazemore* imposes at least a burden of production on Title VII defendants to show that the omission of particular factors would be likely to alter the race or gender-based disparities shown by a plaintiff's statistical analysis.

In the District of Columbia Circuit, a Title VII defendant cannot defeat a statistically significant showing of race-based disparity merely by alleging the plaintiff's statistical analysis omitted relevant considerations. Interpreting *Bazemore*, the D.C. Circuit has rejected "mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities." *Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987). Rather, the D.C. Circuit applies a "rebuttable presumption of equal distribution of the relevant . . . skills." *DeMedina v. Reinhardt*, 686 F.2d 997, 1008 (D.C. Cir. 1982); *accord Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984). To overcome that presumption, the defendant must, at a minimum, articulate a "basis for the assumption that such skills are in fact unevenly distributed." 686 F.2d at 1008.

The Ninth Circuit has similarly interpreted *Bazemore* to hold that a Title VII "defendant cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics." *E.E.O.C. v. General Telephone Co. of Northwest, Inc.*, 885 F.2d 575, 581 (9th Cir. 1989). Rather, the Ninth Circuit held in *General Telephone*, the defendant

must "produce credible evidence that curing the alleged flaws would also cure the statistical disparity." 885 F.2d at 583.

The Second Circuit reached the same result in *Sobel v. Yeshiva Univ.*, 839 F.2d 18 (2d Cir. 1988). In that case, the plaintiff had used regression analyses to demonstrate gender-based wage discrimination. The court rejected the defendant's unsubstantiated allegation that factors omitted from analysis explained the observed disparities. *Id.* at 34 ("no reason, in evidence or analysis, for concluding that [omitted factors] correlated with sex and were therefore likely to affect the sex coefficient").

This conflict is illustrative of a broader, continuing uncertainty as to the factual showing a Title VII defendant must make to rebut a statistically significant showing of race-based disparity. *Compare Catlett v. Missouri Highway and Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1574 (1988) (defendant must produce evidence in rebuttal), *with E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (no evidence required). This Court should grant certiorari to resolve the conflict and clarify the nature of the defendant's burden in response to statistically significant showings of racial disparity in Title VII cases.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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July 29, 1991

APPENDIX

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Hazel HILL, Plaintiff-Appellant,

v.

MISSISSIPPI STATE EMPLOYMENT SERVICE, et al., Defendants-Appellees.

No. 89-4438.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1990.

Black woman who sought job referrals through State Employment Service brought action against Service alleging racial discrimination. The United States District Court for the Southern District of Mississippi, Britt R. Singletary, United States Magistrate, rendered judgment for Service and applicant appealed. The Court of Appeals held that applicant failed to prove discrimination either under disparate treatment or disparate impact analysis.

Affirmed.

Alvin B. Rubin, Circuit Judge, filed dissenting opinion.

Sam H. Buchanan, Jr., Sam H. Buchanan, Jr., [sic] Southeast Miss. Legal Services, Hattiesburg, Miss., for plaintiff-appellant.

Richard D. Mitchell, Jackson, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GEE, RUBIN, and DAVIS, Circuit Judges.

PER CURIAM:

Applying both discrimination models – disparate treatment and disparate impact – we affirm that a black female seeking job referrals from a large but undermanned state employment agency failed to prove a case of discrimination under Title VII. Specific problems with the referral system, established in the record, rebutted any presumption of discrimination, and her statistical analysis critically neglected qualifications and job preferences.

Background

Hazel Hill, a black female, sued the Mississippi State Employment Service (MSES) on her own behalf, alleging that MSES intentionally or recklessly discriminated in its referrals on the basis of race. Her suit stemmed from her dissatisfaction with the treatment which she received when seeking job referrals to prospective positions as a cashier, waitress, or cocktail waitress at MSES's Hattiesburg Office from April 1982 to April 1983, and followed the right to sue letter issued to her by the Equal Employment Opportunity Commission (EEOC) upon the basis of its finding no reasonable cause to pursue the complaint which she had filed against both MSES and the Mississippi Employment Security Commission (MESC).[1]

MSES's job referral procedures lie at the heart of this case, and we therefore outline them. In almost all

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[1] MESC belongs to the national network of state employment services established and funded by the Wagner-Peyser Act, as amended, 29 U.S.C. §§ 49-49k. MSES is a division of MESC and constitutes an employment agency as defined in § 701(c), 42 U.S.C. § 2000e(c).

respects, MSES complies with the operational guidelines established in the Employment Service Manual (ESMII).[2] Operating through numerous local offices throughout Mississippi, MSES refers qualified applicants to area job openings listed with MSES by area employers, but does not guarantee employment. The listing employers indicate the number of applicants sought and the qualifications required, and MSES's clerks process the listings and notify qualified applicants.

To match applicants to jobs, MSES assigns applicants and job orders a nine-digit Dictionary of Occupational Titles Code (Dot Code).[3] The code's first three digits

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[2] The district court found that MSES's [sic] did not comply with EMSII [sic] in one respect. EMSII [sic] § 1294, which bars MSES's processing of job orders containing discriminatory preferences, also authorizes MSES to conduct two inquiries: first, random investigations of employers to whom MSES referred applicants if MSES receives, from any source, information that the employer was discriminating; and second, monthly random reviews. Despite testifying in a Title VII class action against a local employer, the Director of MSES for 13 years prior to this suit testified that MSES conducted no such inquiries during his tenure. We agree with the district court that the one isolated incident neither shows that employers filling positions through MSES widely discriminated nor proves that MSES condoned such practices. Absent any evidence as to the number of complaints, if any, lodged with MSES about local employers, we, like the district court, must decline to draw a pattern of historically condoned discrimination by MSES from the lack of random reviews by MSES.

[3] First, referral applicants, with the assistance of an MSES interviewer, pencil in a MSES 511 form that records their education, training, work experience, job preference and any other relevant information, and the assisting interviewer determines appropriate DOT Code(s). A UC-502 identification card

(Continued on following page)

identify a particular occupational group, the middle three the worker function ratings, and the final three the alphabetical order of the titles within the six digit code.

Referrals occur in two ways: In one, upon an applicant's request MSES clerks search job orders for vacancies that match the applicant's DOT code and, locating an open order with a corresponding code, refer the applicant if the applicant meets the listed qualifications; In the other, to fill orders, pursuant to ESMII § 1470, MSES clerks search the active files of applicants with a matching occupational title and, if that yields an insufficient number of applicants, search inactive files with matching codes and active files of related occupational qualifications. Ultimately, to match job orders with the most qualified applicant as per ESMII guidelines, MSES clerks primarily rely on the DOT Codes, the type of job, and the applicant's experience and job preference, but as well draw from personal knowledge acquired through prior

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contains the applicant's name, social security number, and DOT Code/codes. MSES files the 511 forms alphabetically under the appropriate three digit occupational group code.

Second, MSES interviewers code the employer job orders that identify the available job, the number of vacancies, the number of applicants sought, and job qualifications (i.e.: education, experience). Before coding, Interviewers evaluate whether the educational and experimental criteria provided by the employer relate sufficiently to the open job, and if not, whether MSES will require additional investigation prior to processing the suspect order. Under MSES policy, interviewers should dissuade employers from imposing arbitrary hiring requirements and refuse to service discriminating job orders. ESMII § 1294.

referral matching, such knowledge including subjective judgments (e.g.: an applicant's attitude, appearance, personality, employment history).

An EEOC officer regularly reviews MSES's referral and other services, assessing compliance with federal and state civil rights laws. Documentation drawn from all codes and applicants, but not from actual interviews, furnishes all supporting information for these reviews. Noting that the reviews to the date of trial highlighted problem areas, the conducting officer rated MSES satisfactory overall.[4]

Coded for cashier-checker positions (211-492-014) and for waitress positions (311-477-080), Hill alleges discriminatory referral practices and retaliatory practices. At trial, she pointed to several occasions when MSES failed to refer her to open job orders for which she was coded

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[4] The evidence includes three such reviews. First, the March 1979 review showed all services satisfactory for all but black females, with job development and placement constant for this group. Second, the February 1981 review posted job development contacts for black females at 5% below the benchmark and lacking in quantity, and demonstrated as well a low quantity level of service for blacks. The February review recommended referral to non-traditional jobs for minorities and females reflect a racial and sexual mixture. Third, the April, 1983 review noted that job development contact and placement service for black females, actual referral for white males, and placement after counseling for white males and females fell below the benchmark. The April review suggested that orders indicate a racial/sexual mix of applicants, provided MSES's files included such applicants who would meet the employer's requirements, and that orders exclude non-bona-fide occupational qualifications (e.g.: "must be neat, clean & attractive").

and qualified (qualified, that is, at least to an extent equal to any referred white applicant).[5] MSES, for its part,

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[5] First, to one job order for a cashier, MSES referred 22 whites (5 were hired) and no blacks, 10 of the 22 whites were out of code and 3 did not meet the minimal experience criteria established by this order. Two had no experience and 5 lacked the requisite education. While the order remained open, Hill, who admittedly would have qualified for the job, sought referrals, though not specifically asking for this position. MSES did not refer Hill. Rather, the records, as stipulated, indicate that during the period in which the order remained open and Hill sought referrals, MSES referred Hill to alternate positions (to Carriage Inn as housekeeper, to Church's as counter attendant, to Gold Post Restaurant as counter helper, and to Kentucky Fried Chicken as cashier).

Second, the order for cashiers requesting ten referrals remained open for 5 weeks; MSES referred only 5 applicants, four whites and one black. Qualified blacks on file had the appropriate DOT Code. Hill was not referred to this job order.

Third, a job order for emergency room technicians, also open while Hill sought referrals, requested five applicants, MSES referred only one white woman out of code. Hill, who previously worked at a hospital, was not referred.

Fourth, one day after filing her EEOC charge, Hill sought a waitress referral but was advised no such orders were available. Instead, MSES referred her to the Ramada Inn as a housekeeper. Upon arrival, Hill testified she discovered an open waitress position that had been filed with MSES. That same day, at the direction of Hill's attorney, a white female employee of a legal service organization, sought referrals for waitress jobs with MSES, and the clerk, different than the clerk with whom Hill spoke, provided her two waitress referrals.

Fifth, seeking referral to County Market General Store, Hill was told there were no openings; she personally went to the store and discovered an open position, and told a MSES clerk

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pointed to a record of MSES referrals received by Hill and to Hill's work history, showing ten positions held by Hill prior to the period in question, with the length of each generally fluctuating between a few weeks and a few months.[6] All MSES employees with whom Hill had contact specifically denied racial considerations in referral selections, attributing referral problems, such as those reflected in Hill's evidence, to employee error.

Respecting the total number of MSES referrals during the relevant period, Hill and MSES stipulated to white/non-white ratios of applicants in the active file, overall an

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that a white woman had been hired for the position. Hill lacked one year's experience in grocery checking as required by the job order. The clerk gave her a referral to County Market and Burgertown as a cashier.

[6] Specifically, Hill received 16 referrals between January and June 1983, two as a housekeeper, five as a counter attendant, four as a cashier, and five as a waitress. Ten occurred after April 14, 1983 and all cashier referrals occurred after this date. The Court specifically found all referrals occurred during the relevant period. As pointed out, this finding is internally inconsistent with declaring the relevant period to end on April 14, 1983.

Additionally, Hill was registered as a work incentive participant in February 1983 and trained as a cashier-checker from April to May 1983. Since April 1982, Hill worked as follows: maid for three days, cashier for two weeks, attendant for 10 months, waitress for 7 months, and waitress.

average of 58.2% white, 41.7% non-white.[7] As well, both stipulated: MSES referred 473 applicants to orders classified in the 311 DOT Code (255 or 53.9% white and 218 or 46% black) from April 1982 to February 1983, and of the 478 referrals, 233 were referred out of their primary DOT Code (120 or 51.5% white and 118 or 48.4% black.) Additionally, 41 of the 95 job orders processed had more than one referral, 31 of the 41 orders having both black and white applicants, and of the 373 applicants referred to these 31 job orders, 184 were white (49.3%) and 189 black (50.6%).

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[7]

TOTAL ACTIVE FILE		WHITE		NON-WHITE	
April 1982	2518	1316	(52.2%)	1202	(47.7%)
May 1982	2593	1384	(53.3%)	1214	(46.8%)
June 1982	2940	1608	(54.6%)	1332	(45.3%)
July 1982	3470	1949	(56.1%)	1521	(43.8%)
Aug. 1982	3683	2124	(57.6%)	1559	(42.3%)
Sept. 1982	3243	1894	(58.4%)	1349	(41.5%)
Oct. 1982	3707	2227	(60.0%)	1480	(39.9%)
Nov. 1982	3855	2312	(59.9%)	1543	(40.0%)
Dec. 1982	3517	2126	(60.4%)	1391	(39.5%)
Jan. 1983	3463	2100	(60.6%)	1363	(39.3%)
Feb. 1. '83	3775	2259	(59.8%)	1516	(40.1%)
Feb. 28. '83	4107	2519	(61.3%)	1588	(38.6%)
OVERALL AVERAGE	3405	1984	(58.2%)	1421	(41.7%)

TOTAL BLACK/WHITE DOT CODE 311 REFERRALS APRIL 1982–FEBRUARY 1983		WHITE	BLACK
	473	255 (53.9%)	218 (46%)

* Hill denied that all 311 referrals above were waiter/waitress.

Without accounting for employer qualifications, which may have rendered some applicants unacceptable for referral, MSES filled relevant job orders from April 1982 to February 1983 as follows: processing six cocktail waitress orders, shorting four, and referring in total 21 whites and no blacks; processing 39 waitress orders, shorting 14 (11 of which referred no blacks), and referring in total 113 whites and 46 blacks (but referring no blacks to 24 of the 39 orders); and processing 146 cashier job orders and referring in total 998 whites and 457 blacks (but in 57 of the 146, referring only white applicants).[8]

Himmelstein, Hill's statistics expert, analyzed the actual referral pool derived from the stipulations above and the unreferred pool as manifested in data generated by a computer program developed to reflect referrals in the 211 and 311 codes on the basis of race. MSES controlled and supplied all information used to develop the program and Hill's computer expert ran the program on MSES's computers.[9] The program searched MSES's relevant files to show an applicant's DOT Code on a given date, and the data generated reflects black and white unreferred applicants with either a 211 or 311 code during the relevant time period. Looking for a pattern of referral based on race and not attributable to chance,

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[8] By "shorting," we mean referring a number of applicants less than that requested by the employer.

[9] The MSES systems analyst for 19 years, who assisted in formulating the program, called it the best possible, but nonetheless inaccurate, because it drew data from the limited ESARS system developed by the Department of Labor to report record placement transactions. The ESARS system does not account for applicants' experience.

Himmelstein factored the data, generated by running the program with the three digit numbers of the occupational codes, into a formula to determine the number of standard deviations. For cocktail waitress, waitress, and cashier positions, respectively, he calculated standard deviations 4.88, 8.78, and 3.41, all of which are considered statistically significant. Applying the formula to data generated from the entire nine-digit code, Himmelstein calculated a standard deviation of 2.58 for the 211 Job Orders and 1.92 for the 311 Job Orders. Few applicants or referrals matched the nine digit code.

MSES's statistical expert, Piette, considered the unreferred pool generated by the program inaccurate, whether generated from the nine or the three digit codes Piette identified several additional problems in the program: inability to distinguish part time from full time jobs and an applicant's preference; inability to assign value to important factors such as education or experience; and inability to consider difficulties or inabilities in contacting particular applicants to apprise them of referrals.[10] Piette, however, admitted that changes in the program

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[10] Hill provided some evidence regarding qualifications. A vocational expert, Semko, reviewed the qualifications of the 269 whites referred in 87 job orders. MSES referred white applicants equally or less qualified than Hill to 39 of the 87 orders, the referred white applicants' qualifications falling clearly below Hill's in 25 of the 39, 66 of the 269 whites referred had qualifications equal to or less than Hill's, with 37 of the 66 clearly less qualified. Significantly, Semko excluded from consideration the remaining 203, all being more qualified than Hill.

would only reduce the standard deviations calculated by Himmelstein.

Examining the racial composition of the referred applicant pool, Piette concluded MSES's referrals and referral procedures to be neutral. Based upon the print-outs generated by Hill's program. Piette found 65.9% of all applicants (referred or unreferred) to be non-black compared to 34.1% black in the 211 code, and 50.1% non-black compared to 49.9 black in the 311 code. Only 13.5% of the total 211 coded applicants (69.2% non-black, 30.8% black) and 31.5% of the total 311 coded applicants (54.5% white, 45.5% black) received MSES referrals. Analyzed by racial composition, referrals nearly equalled the racial composition of the applicant pool. The proportions of out-of-code referrals by race among total referrals for the 211 code were 70.4% black and 64.3% white; for the 311 code, 78.9% black and 73.9% white. For out-of-code referrals to 211 positions, 32.8% were black and 67.2% white; for 311, 47.1% black and 52.9% white.

Racial Discrimination Claim

To locate our review today in the proper legal context, we briefly condense the Supreme Court's methodology for analyzing Title VII actions. The Court probes Title VII actions under two well-established models for ferreting out unlawful discrimination: disparate treatment and disparate impact analysis. The first concentrates on discriminatory motive, the second on discriminatory effect. On the issue of discrimination, in either case, the plaintiff bears the ultimate burden of persuasion; but the onus of producing sufficient evidence for us to assess

whether the plaintiff met this burden shifts. *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 109 S.Ct. 2115, 2120, 104 L.Ed.2d 788 (1989). Hill asks that her case be analyzed under both models, and we do so.

Pinpointing both overt and covert discrimination, disparate treatment analysis reveals differential treatment of similarly situated persons on the basis of impermissible factors such as race or sex. Dislodging the status quo of prior discrimination, disparate impact analysis discloses the disproportionate impact of a facially neutral but non-job-related policy upon a protected group such as blacks or women. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1971). Either model is applicable to employment practices that utilize discretionary and subjective criteria. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

Only the disparate treatment model requires proof of discriminatory animus, and it requires such proof whether a given action alleges individual or class-wide (pattern and practice) discrimination. Although, for individual allegations, a single proven instance of unlawful disparate treatment suffices, showing class-wide disparate treatment requires more than isolated or exceptional instances of differential treatment. Hill does not assert class-wide disparate treatment. In either case, the necessary animus may be shown directly or inferred from circumstantial evidence.

Statistics play an important evidentiary role; circumstantial evidence of disparate treatment often includes

(but need not) statistical evidence, and a finding of disparate impact requires statistically significant disparities. Statistics are not irrefutable; as the Supreme Court cautioned, "they come in infinite variety." *Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). Indeed, we ourselves have noted that soundly compiling and assessing statistics is "a task both complex and arduous." *Wilkins v. University of Houston*, 654 F.2d 388, 410 (5th Cir. 1981). Particularly in a case such as Hill's, alleging discriminatory referrals, we must carefully balance the danger of prejudice to a defendant posed by drawing inferences of discrimination from a handful of referral decisions and the unfairness to the Title VII claimant of imposing unattainable standards for proof of discriminatory intent. *Pegues v. Mississippi State Employment Services*, 699 F.2d 760, 769 (5th Cir. 1983). Hence, we must be acutely aware that spotting mistaken understandings or mischaracterizations of numerical data either to suggest or to camouflage discrimination calls for a finely tuned quantitative and qualitative eye.

With the proper methodology in mind, we turn to Hill's evidence. The case requires from us two standards of review. Whether MSES unlawfully discriminated against Hill constitutes the ultimate fact at issue in this Title VII action, and consequently we address this issue de novo. Even so, unless clearly erroneous, the trial court's findings of subsidiary fact bind us. *Wilkins v. University of Houston*, 654 F.2d 388, 390 (5th Cir. 1981).

A. Disparate Treatment

The district court properly divided its factual inquiry into three stages: (1) Hill's prima facie case; (2) MSES's

rebuttal; and (3) Hill's showing of pretext. We follow suit. First, we find no flaw in the prima facie test set forth by us under similar facts and applied here by the District Court. *See Pegues* at 774. Second, with reservations noted below we accept MSES's proffered rebuttal. Third, we find that Hill failed to show pretext.

Following our lead, to establish her prima facie case the court required Hill to prove by a preponderance of the evidence (1) her membership in a protected group, (2) her application and coding for an occupation for which MSES was making referrals, (3) her failure to secure a referral, and (4) MSES's later referral of non-members of the protected group. We agree that the specific incidents of non-referral (supra, n. 5) establish Hill's prima facie case and engender a presumption of discrimination.

MSES countered, attributing its practices to inefficiencies inherent in a large, heavily-utilized, bureaucratic, and undermanned system with limited resources. Specifically, MSES cited employee error or oversight, inefficient communication between staff members, inability to contact applicants, and applicants' preferences. These, MSES contends and the district court found, satisfy MSES's burden of producing a legitimate non-discriminatory reason for its practices. Although we note our reservations below, we must agree.

Accepting general inefficiency as a legitimate business reason troubles us, for it seems a likely candidate for use as a shield for almost any employer – including a discriminating one – to raise.[11] As the Supreme Court

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[11] As the dissent aptly points out, on the average even specifically demonstrated inefficiencies should weigh against

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emphasizes, the desire to home in on the critical and telling evidence schools our tripartite analysis. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256-57, 101 S.Ct. 1089, 1095-96, 67 L.Ed.2d 207 (1981). An employer's mere affirmations of good faith in individual selections add no factual assistance and cannot adequately rebut a prima facie showing of racial discrimination. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342, n. 24, 97 S.Ct. 1843, 1858, n. 24, 52 L.Ed.2d 896 (1977); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 766 (5th Cir. 1983).

Likewise, an utter lack of specifics on an employer's part does little to sharpen the fact-finder's inquiry and is equally unacceptable. Here, however, MSES does not offer us an "utter lack of specifics," but rather details the numerous problems that produce its general inefficiency – the district court finding sufficient evidence of each problem and of efforts by MSES to combat it. Naturally, the systematic problems proved to exist more credibly spawn disparities in cases such as MSES's, which involve scores of different referrals to scores of different employers, than in cases concerning the hiring practices of a single employer for a single position. MSES need not prove that the proffered reasons actually motivated it. *Burdine*, 248 U.S. at 254, 101 S.Ct. at 1094. Proving that

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blacks and whites equally. Because any given, individual prima facie case of apparent disparate treatment may be explained on such grounds of inefficiency, we should not presume slanted effects. To show pretext, the plaintiff may demonstrate, with properly compiled and analyzed statistics, a significant slanting.

they did not is a task for Hill, as the plaintiff, in connection with the pretext issue. To overturn a finding as clearly erroneous, the entire evidence must leave us with a "definite and firm conviction that a mistake has been committed". *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *United States v. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746 (1918) [sic]. While we would have preferred even greater evidentiary support for MSES's systematic problems, we cannot say that court's subsidiary findings were unsupported or clearly erroneous; therefore, we must accept them.

If in truth an agency's or an employer's verified, detailed and documented inefficiency, absent any discriminatory animus, accounts for results that nonetheless appear at first glance to be the product of discrimination, it would be the height of unfairness to infer fallaciously such a discriminatory animus. We do not mean to condone inefficiency; we simply cannot punish it under Title VII. With solace, we note: the phrase "to raise a shield of inefficiency," no matter how well factored and documented, does not translate automatically as "to fend off a claim of discrimination;" a claimant may show pretext.

To show pretext, Hill relied upon the statistical evidence, but the lack of an experience component and a job preference component render the statistics fatally defective. *Pegues* at 710. Lest we forget that MSES's stated goal, imposed by EMSII, is to match open jobs with the most qualified applicants, corresponding referral decisions turn heavily upon experience and education. Failure to include these factors would render some applicants ineligible for referral, decreasing the size of the applicant

pool upon which the statistical analysis rests and producing misleading numbers.

It is true, as MSES's expert testified, that incorporating these components would only lower the standard deviations presented to us, but by how much we do not know and the evidence does not tell us, particularly given the components' critical nature. Statistically accounting for qualifications might explain the disturbing number of short referrals, specifically those in which MSES referred only whites (*supra*, p. 1237); but absent such particularized accounting, we cannot distill discriminatory animus from the practice. In her brief, pointing out that the same DOT Codes include traditionally minority jobs (e.g., counter attendant) and traditionally white jobs (e.g., waitresses), Hill accuses MSES of steering. Again, we lack any concrete evidence upon which to base such a conclusion. The Title VII plaintiff must ultimately prove discrimination by a preponderance of the evidence; and, accordingly, such evidentiary gaps weigh against Hill.

The gaps in Hill's statistics do not stand as the sole barrier to her attempt to show pretext. MSES's system, though inefficient, appears facially to be neutral. The percentages of referred and unreferred applicants equalled the overall racial percentages in the 211 and 311 pool: The same is true for out-of-code referral (which slightly favored black applicants). Of course, facial neutrality at the bottom line cannot immunize an agency or employer from proved acts of discrimination against an individual; but, at the same time, we cannot infer discrimination against an individual from statistics displaying neutrality toward the group. *Furnco Constr. Corp. v.*

Waters, 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2950-51, 57 L.Ed.2d 957 (1978) ("Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided"); cf. *Connecticut v. Teal*, 457 U.S. 440, 454, 102 S.Ct. 2525, 2534, 73 L.Ed.2d 130 (Racially balanced promotions at the bottomline did not relieve an employer from the requirement that it show that a written screening test, determining the eligible candidates for promotion and disproportionately disqualifying blacks, was sufficiently job-related).

B. Disparate Impact

Hill suitably identified the specific employment practice challenged – a referral system utilizing subjective traits and out-of-code referrals – but again, her statistical analysis failed her. *Wards Cove* at 109 S.Ct. 2124, *citing Watson*. The figures – the same asserted to demonstrate pretext under the disparate treatment model – do not offer sufficient proof that the challenged practice disproportionately affected a protected group (here, blacks) because, again, these figures neglected the education and experience factors critical to referral decisions. Since the district court considered all the evidence, both statistical and non-statistical, in reaching its conclusion of no discrimination under the disparate impact model, we decline Hill's invitation to remand for any further findings.

Having reached the ultimate issue of discrimination, and having found none, we need go no further. Yet, we cannot permit future Title VII analysis to be tainted by

the district court's casual acceptance of the following fallacy: both black and white MSES clerks serviced Hill; therefore, she was not the victim of discrimination, (that is, "Blacks never discriminate against other blacks.") To the argument's self-evident overbreadth, we add that the Supreme Court has rejected it. *Castenada v. Partida*, 430 U.S. 482, 513, 97 S.Ct. 1272, 1289, 51 L.Ed.2d 498 (1977).[12] We recognize the court's blameless intent simply to explain what inferences may be drawn from an employer's use of subjective criteria (which does not "*necessarily*" indicate discriminatory animus or impact, regardless of the determining individual's color); but we must be sure that the court's dubious explanatory language does not generate a later, ill-conceived concurrence with the fallacy.

Retaliation Claim

To prevail on a retaliation claim, Hill must prove that she engaged in a protected activity, that an adverse employment action occurred, and that a causal connection between the two existed. *McMillan v. Rust College, Inc.*, 710 F.2d 1112 (5th Cir. 1983). Hill contends that her EEOC complaint prompted MSES employees to harass her. Specifically, the employees allegedly stared at her, followed her, prolonged the time she spend waiting for a clerk, relegated her file to black referral clerks, destroyed her identification card, deleted experience data from her 511 form, and criticized her claim of discrimination to a Work Incentive class. All of this, according to Hill, caused

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[12] Similarly, we reaffirm that adequately servicing Hill in some areas (e.g. training) would not have excused discriminating against her in other areas. *Pegues* at 775.

here to be hospitalized and to miss referrals. The fact that Hill received numerous referrals and continued services after filing the EEOC complaint did not escape the district court's attention. In short, the magistrate sitting at trial and observing the witnesses judged as more credible the employees' testimony denying Hill's allegations: MSES replaced rather than simply destroyed Hill's identification card; whether MSES employees actually mentioned Hill's claim to the Work Incentive class or, if they did, what exactly they said, is unclear; and no testimony indicated that MSES employees made any statements in retaliation for Hill's EEOC complaint. The above findings not being clearly erroneous, we affirm the court's judgment in MSES's favor.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

Inefficiency is racially neutral. It cannot of itself account for racial discrimination. When a person establishes a prima facie case that a state agency has discriminated against her because of her race, I would not accept as a "*legitimate* nondiscriminatory" reason for the agency's admitted difference in treatment between her and the members of another race that the ineptness of its employees, the inadequacy of its budget, the size of its system, or the bureaucratic nature of the machinery it has devised suffice to negate the discriminatory animus manifested by the decisions, at least partially subjective, that its own employees have made.

The Mississippi State Employment Service is not a disembodied entity on high that functions independently of its employees. It is itself the *deus ex machina* that puts

the actors on the stage and directs them. The allegedly inefficient, regulation-hamstrung, overworked employees whom it has hired and through whom it functions *are* the MSES. It may not wash its hands of the spots, whether damned or merely discriminatory, by which their actions have stained the MSES. Indeed were its employees merely inefficient, their actions would not have resulted in racial discrimination, for inefficiency would function as much to hamper white as minority applicants in seeking jobs. Yet MSES's actions is fact put stumbling blocks in Ms. Hill's path that were not placed before the paths of white job applicants.

In addition to my inability to accept the proffered excuses as legitimate reasons for the nonreferral of black applicants, I would find the magistrate's findings of subsidiary fact as to pretext clearly erroneous, and I would find that Hill has established a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Fair Employment Practices Act, by disparate treatment. I therefore respectfully dissent from the majority opinion without reaching the disparate impact or retaliation claims.

I. Disparate Treatment

The Act forbids racial, religious, and sexual discrimination in employment. In *McDonnell Douglas Corp. v. Green*[1] the Supreme Court set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff

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[1] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[2] Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[3] To fulfill its duty of articulating a legitimate non-discriminatory reason, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.[4]

The magistrate found, and the majority opinion affirms, that Hill established a prima facie case of racial discrimination. The evidence of such discrimination was not merely statistical. From April 1982 to April 1983, the period in which Hill contends she was a victim of discrimination, she sought employment as a waitress or a cashier partially because she could earn more than the minimum wage usually paid fast-food restaurant counter attendants (who, because they not only accept and deliver orders but receive payment are sometimes denominated "cashiers"). As the majority opinion indicates in a footnote,[5] on several occasions during the

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[2] *Id.*, at 802, 93 S.Ct. at 1824.

[3] *Id.*, at 804, 93 S.Ct. at 1825.

[4] *Texas, Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

[5] Majority opinion, fn 5.

period when Hill sought employment as a cashier or waitress MSES demonstrated an unusual pattern of referrals of applicants for the position of cashier.

Case 1. MSES referred 22 whites for interviews for employment as cashier, of whom 5 were hired. It did not refer a single black applicant. Ten of the 22 whites were "out of code," meaning that "cashier" was not their primary prior occupation and three did not even meet the minimal experience criterion established by the job order. Two had no experience and five lacked the requisite education. "While the order remained open, Hill, who admittedly would have qualified for the job," the majority opinion condedes, "sought referrals, though not specifically asking for this position,"[6] as indeed she could hardly have done unless she had specific knowledge of the job order. Instead, "during the period that this order remained open and Hill sought referrals," the MSES *did* refer her to what it calls "alternate positions,"[7] all of them stereotypical for black persons in the deep south: to a motel as a "housekeeper," an euphemism for a maid; to two fast-food chains, Church's and Kentucky Fried Chicken as a "cashier", and to another as a counter helper. These were in effect jobs making beds or serving fried chicken. It scarcely bears mention that MSES does not contend that Hill was unqualified in any way for the job to which only whites were referred.

Case 2. An order for cashiers requesting ten referrals remained open for five weeks. MSES referred only five

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[6] *Id.*

[7] *Id.*

applicants, four of whom were white. Neither Hill nor any other putatively qualified black was referred for the remaining five interview slots.

Case 3. "[A] job order for emergency room technicians, also open while Hill sought referrals, requested five applicants. MSES referred only one white woman, out of code. Hill, who previously worked at a hospital, was not referred."[8] MSES does not contend that Hill's prior hospital experience did not qualify her for at least an interview with the employer, who requested four more persons for interviews than the number actually referred.

Case 4. One day after she had filed her EEOC complaint, Hill again sought a job referral as a waitress. Instead she was referred to a Ramada Inn as a "housekeeper." Upon arrival she found that the Inn had filed a request for a waitress with the MSES. "That same day, at the direction of Hill's attorney, a white female employee of a legal services organization sought referrals for waitress jobs with MSES, and the clerk, different than [sic] the clerk with whom Hill spoke [sic], provided her two waitress referrals."[9]

We, as well as other courts, have recognized that subjective selection processes tend to facilitate the consideration of discriminatory criteria.[10] While the MSES

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[8] *Id.*

[9] *Id.*

[10] *Roberts v. Gadsden Memorial Hospital*, 835 F.2d 793, 798 (11th Cir. 1988); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 827 (5th Cir. 1982); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1560 (11th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 274, 93 L.Ed.2d 250 (1986).

admits that the employees with whom Hill had spoken did use subjective criteria as well as job codes in making referrals, the job referrers denied racial considerations in referral selection. Instead, the MSES and its employees presented a united front: the problems merely reflected employee error. The coincidence of such employee error consistently operating to the detriment of Hill strains credulity. A cashier may sometimes be "short," that is, she may sometimes turn in less cash than her register records, but if this is due to error, then she ought also, at lease on some occasions, to be "over," having more cash than the register records. There is reason to suspect the employee who is always short and never over. Moreover, Hill's statistical expert testified to a significant statistical deviation in referring blacks. Even the MSES's statistical expert conceded that Hill's data demonstrated that the MSES system has a statistically significant disparate effect on black applicants, although he rejected the magnitude of the measure.

The majority refers to the MSES "system" as racially neutral. But verbal neutrality does not suffice to explain discrimination in application. The MSES has not shown a single instance in which its inefficient system favored black employees or in which the failure to refer employees to jobs resulted from difficulty in reaching Hill – or from overwork – or from red tape. Presumably so inefficient a system would sometimes result in the neglect or oversight of white applicants. The evidence shows that the MSES systems is inefficient only when it fails to refer black employees.

II.

The majority opinion does not even attempt to define what is meant by a legitimate nondiscriminatory reason. It contents itself with the conclusion that an employer's inefficiency limited budget, self-manufactured red tape, and the excessive work load it places on its own employees, suffice. I submit that none of these alone nor all together constitute *legitimate* reasons for discrimination. Surely the word "legitimate" must mean more than simply non-criminal or not forbidden by law, for we would not as a matter of course accept either a criminal act or one otherwise forbidden by law as sufficient to justify discrimination. Instead, a "legitimate" reason must be one that is justifiable in view of the purposes of the Fair Employment Practices Act.

The Supreme Court has given support to this interpretation, stating that "[t]he broad overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."[11] A legitimate reason must be in some degree related to job efficiency, the employer's needs, or the applicant's qualifications. That, to me, is implicit, though never expressed, in *Texas Department of Community Affairs v. Burdine*.[12] Oversight of an applicant is not a legitimate reason, for, like inefficiency, it does not serve any justifiable employment purpose. Thus, in *Roberts v. Gadsden Memorial Hospital*[13] the employer responded to a prima facie case of

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[11] *McDonnell Douglas*, 411 U.S. at 801, 93 S.Ct. at 1823.

[12] 450 U.S. at 248, 101 S.Ct. at 1089.

[13] 835 F.2d at 793.

disparate treatment by claiming that he had simply never considered Roberts for the available position and therefore could not have been guilty of discriminatory intent. Instead, he had hired someone with whom he was friendly on a social basis. The court held that the employer's failure to consider Roberts was itself disparate treatment and therefore could not constitute a defense:

> where . . . an employer has reason to know that an employee is qualified for a position and that the employee might desire to be considered for that position, the employer's failure to consider the employee for promotion is not a legitimate, nondiscriminatory reason sufficient to rebut an inference of intentional disparate treatment.[14]

Cant by an employer and homilies against discrimination delivered to its employees do not suffice to explain the discriminatory effect of its employees' practices. If its employees' actions result in racial discrimination, their malfeasance is not sufficient to rebut the inference of racial discrimination already demonstrated by the plaintiff in establishing her prima facie case. The MSES is itself responsible for its employees' actions.

The need for efficiency constitutes a defense in disparate-treatment cases. It would be ironic if the employer's claim of its own inefficiency also served as a defense.

This ought to dispose of the defense to the disparate-treatment case. Even if it does not, I submit that the

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[14] *Id.* at 798. *But see Gaballah v. Johnson*, 629 F.2d 1191 (7th Cir. 1980).

magistrate was clearly erroneous in concluding that the reasons advanced by MSES were not a pretext. The MSES, acting through its employees – the only way in which it could act – intentionally discriminated against Hill.

For these reasons, I would reverse the judgment, render judgment in Hill's favor on her discrimination claims and remand the case to the district court to determine the appropriate remedy.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

HAZEL HILL — PLAINTIFF

VERSUS — CIVIL ACTION NO. H83-0281(W)

MISSISSIPPI STATE EMPLOYMENT SERVICE, HATTIESBURG DIVISION; MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; O.H. SIMMONS, EXECUTIVE DIRECTOR; HUGH GIBSON, WILLIAM G. LEONARD, and MARY BRYANT, COMMISSIONERS

DEFENDANTS

MEMORANDUM OPINION

FILED
MAY 01 1989

This cause came on for trial on December 12, 1988 in the United States District Court for the Southern District of Mississippi, the Honorable Britt Singletary presiding and this Court, having heard and considered all testimony and having thoroughly reviewed all the evidence, enters the following opinion:

I. PROCEDURAL HISTORY

Plaintiff, Hazel Hill ("Hill") is an adult black female resident of Forrest County, Mississippi. Defendant, Mississippi State Employment Service ("MSES") is a division of Defendant Mississippi Employment Security Commission ("MESC") which is a member of the national network of state employment services established and funded by the Wagner-Peyser Act, as amended, 29 U.S.C.

§ 49 through 49(k). MSES is an employment agency as defined in § 701(c), 42 U.S.C. § 2000(e)(c).

The relevant time period in the present case is April 1, 1982 to April 14, 1983. During this period, Hill sought job referrals as a cashier, waitress and cocktail waitress from MSES's local office in Hattiesburg, Mississippi. On March 8, 1983, Hill filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against MSES and MESC alleging racial discrimination against each for failing to refer Hill to jobs for which she was qualified. The EEOC found no reasonable cause to pursue Plaintiff's allegations but issued a right to sue letter on July 5, 1983.

On September 2, 1983, Hill filed the present complaint[1] alleging that MSES intentionally and/or recklessly discriminated against her based on race in their job referral practices. Her claims are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq*. The suit is an individual claim of discrimination as Hill seeks declaratory and injunctive relief and backpay as remedies for the alleged discriminatory acts and practices.

II. MSES'S REFERRAL PROCEDURES

MSES operates numerous local offices throughout the State of Mississippi which provide job referrals to applicants. MSES does not guarantee employment but only

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[1] For purposes of this opinion, it is only necessary to outline the claims which were tried before the court. Any remaining claims were either voluntarily dismissed by Hill or dismissed by action of the District Court.

refers qualified applicants to jobs in the area. Area employers place job orders with MSES expressing both the number of applicants sought and the qualifications required of each applicant. MSES's clerks process each job order and notify the qualified applicants of the job opening.

MSES's job referral service is accomplished by utilizing a nine digit Dictionary of Occupational Titles Code (hereinafter referred to as "DOT Code"). Each applicant seeking a job referral from MSES is interviewed and provided a MSES 511 form. The interviewer records the applicant's education, training, work experience, job preferences and other relevant information on the 511 form. Based on this information, each applicant is assigned a corresponding DOT Code.

The first three digits of the DOT Code identify a particular occupational group, *i.e.*, 311 = waiter/waitress and related food services. The middle three digits identify worker function ratings. The final three digits indicate the alphabetical order of the titles within the six digit code.

The 511 form is recorded in pencil to permit updating and is filed alphabetically under the appropriate three digit occupational group code. Applicants also fill out a UC-502-identification card which contains their name, social security number and DOT Code or Codes.

MSES's interviewers process employer job orders. Employer orders include information concerning the job, the number of vacancies, number of applicants sought

and job qualifications, including education and experience requirements imposed by the employer. Interviewers were authorized to evaluate whether educational and experiential criterion were sufficiently job-related and if not, whether additional investigation was required prior to processing any suspect job order. MSES's policy encouraged interviewers to dissuade employers from imposing arbitrary hiring requirements. Discriminating job orders were not serviced pursuant to the guidelines established in the Employment Service Manual II, § 1294 (hereinafter "ESMII"). ESMII provided operational guidelines, with which MSES was required to comply.

Once the necessary information concerning the job order was gathered, interviewers coded each job vacancy in the order according to the DOT Code classification used for applicants.

Once an applicant requested a referral, the interviewer or clerk would search the job orders for vacancies matching the applicant's 511 form. If the search produced a matching order which was open and which the applicant was qualified for referral, the clerk would refer the applicant.

Pursuant to ESMII, § 1470, interviewers were to first search active files of applicants with a matching occupational title and code to the employer order. If the search failed to produce sufficient applicants, interviewers were directed to search inactive files with matching codes and active files of related occupational qualifications, namely, those files with a matching first three digit group.

The primary factors considered were the DOT Codes, the type of job and the applicant's experience and job

preference. Interviewers also relied on personal judgment and experience in matching referrals and such decisions included subjective factors including the applicant's attitude, appearance, personality, employment history and other relevant job-related factors. Pursuant to the guidelines established in the ESMII, MSES attempted to match job orders with the most qualified applicant.

The Court's finding on these matters is based on the testimony of Jimmie Poole, the placement supervisor at the Hattiesburg office during the relevant period and the testimony of Betty Pace and Larry Hurt, referral clerks in the Hattiesburg office during the relevant period.

Additionally, certain applicants were classified as either Extended Benefit Applicants or Federal Supplemental Compensation Claimants. Federal and state statutes require that such applicants be referred to any job for which they are qualified provided such positions pay minimum wage. They were not priority referrals and separate files reflecting these applicants were not kept by MSES.

During the period of April 1, 1982 through April 4, 1983, Hill was coded for cashier-checker (211-462-014) and waitress (311-477-030). Her primary claims concern alleged discriminatory acts and practices in making such referrals as well as claims of retaliation as a result of her filing an EEOC charge.

III. EVIDENTIARY FINDINGS

At trial, Hill offered historical, circumstantial, direct and statistical evidence to establish her *prima facie* case.

MSES offered statistical and other evidence in rebuttal. Upon review of all the evidence, this Court finds:

A. Historical Evidence

Pursuant to ESMII § 1294, MSES's employees are required to refuse to process job orders where an employer has stated discriminatory preference. Section 1294 also authorizes random investigations of employers who received referrals where the office had information, regardless of the source, that the employer was discriminating. Random referral reviews of one month were also authorized.

Based on the testimony of Herman Teal, the Director of MSES for 13 years prior to the filing of the present suit, this Court finds no such investigations were conducted during a 13-year period prior to the institution of this suit. The Court further finds that this evidence alone is insufficient to establish a pattern of historically condoned discrimination by MSES. There is no evidence as to the number of complaints, if any, lodged with MSES about local employers.[2]

B. Circumstantial Evidence

MSES was subject to yearly Equal Employment Opportunity Compliance reviews wherein their referral

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[2] Although Teal testified in a Title VII class action against a local employer, Neco, an isolated incident does not constitute wide-spread employer discrimination or MSES condonation of such practices.

and other services were evaluated with regard to federal and state civil rights laws.

A review dated March 2, 1979 found "the level of service" satisfactory for all groups except black females. Job developments and placements were constant for this group. A review dated February 25, 1981 found Job Development contacts for black females five percent below bench mark and lacking in quantity. The quantity level of service for blacks was reported as low.

The same review recommended a sexual and racial mixture be reflected in referrals to non-traditional jobs for minorities and females. The recommendation noted active applicants from each group when job orders were received.

An EEOC compliance review dated April 21, 1983 recommended job orders should include a mixture of applicants based on race and sex provided such applicants were in the file and met the employer's requirements. Additionally, the review recommended that non-bona fide occupational qualification statements (*i.e.*, "Applicant must be neat, clean and attractive") should be avoided on orders. The review also found black females below bench mark for job development contact and placement after job development. White males were below bench mark in actual job referrals, while males and females were below bench mark in applicants placed after counseling.

The EEOC reviews discussed above were conducted and authored by Mr. Lewis Beverly, a black male EEOC officer in charge of training MSES's staff with regard to applicable EEOC regulations and civil rights laws. As is

evidenced by the reports, MSES's Hattiesburg office performance was rated satisfactory overall. Mr. Beverly testified the reviews highlighted problem areas which needed improvement. He further testified his recommendations were based solely on documentation rather than actual interviews with the applicants. Further, the figures reflected in the reviews were based on all codes and applicants. He stated it was impossible to refer every applicant to a particular job and noted that MSES's personnel worked to improve the areas noted in the reviews.

Herman Teal testified measures were instituted in an effort to improve areas reported in the EEOC reviews. Such measures involved adding more blacks to the staff, creation of the affirmative action compliance plans and minority forums.

C. Direct Evidence

Additionally, Hill pointed to specific incidents of alleged discrimination in job referrals. The first incident involved referrals of cashiers to Hudson's, a department store in Hattiesburg, Mississippi. Lewis Beverly testified that upon reviewing this job order, he noted that 22 white applicants were referred, 5 of whom were hired. No black applicants were referred. Beverly stated Hill was qualified for this job. He also noted that 10 of 22 whites referred to this order were referred out of code and 3 did not meet the minimal experience criteria established by the employer. Two of the 22 referrals had no experience required by the job order and 5 of the 22 referrals lacked the educational requirements.

Marie Edwards and Kay Hildebrand, MSES's clerks, each admitted Hill was qualified but was not referred. The records of referrals indicate Hill had been referred to the Hattiesburg Ramada Inn on January 10, 1983. Beverly opined that Hill may have been considered inactive and therefore not referred to the Hudson's opening. However, Beverly noted that the Hudson's job order was opened January 12, 1983 and was not closed until March 18, 1983 and that Hill sought referrals in February and March.

MSES conceded the referrals to Hudson's did not meet the ESMII standards. However, the Hudson's job order was 1 of 142 orders processed by MSES which was subject to review. Additionally, the records, as stipulated, indicate Hill received the following referrals:

(1) February 11, 1983 – referred to Carriage Inn as housekeeper;

(2) February 11, 1983 – referred to Church's as counter attendant;

(3) February 23, 1983 – referred to Gold Post Restaurant as counter helper; and

(4) March 2, 1983 – referred to Kentucky Fried Chicken as a cashier (position filled however).

A second incident involved referral for cashiers at a local convenience store which opened February 1, 1983 and closed March 7, 1983. According to Beverly, the job order requested ten referrals but only five applicants were referred by MSES. Four of the applicants were white and one was black. Hill was not referred to this job order. Beverly stated short referrals were areas of concern which were discussed with local managers. He added qualified blacks on file had the appropriate DOT Code.

A third order of concern to Beverly involved referral of applicants as an emergency room technician which opened March 2, 1983. Five referrals were sought but only one white female was referred. Additionally, the referral was out of code. Beverly noted that Hill had previous work experience at a hospital but was not referred.

On March 10, 1983, one day after Hill filed her EEOC charge, she sought a waitress referral from MSES but was advised no such orders were available. She was referred to Ramada Inn as a housekeeper but testified that upon arrival she discovered a waitress job was available and on file with MSES. On the same date, Shirley Herrin Garrison, a white female employee of the Southwestern Mississippi Legal Services, sought referrals for waitress jobs with MSES upon the direction of Jeremy Eisler, Hill's attorney. Marie Edwards, a black MSES clerk, gave her two waitress referrals to Chez Paul and Pier 49. Edwards testified that Hill sought referrals from Kay Hildebrand and that Hildebrand might not have been aware of the job orders from Chez Paul or Pier 49. She added it was common for interviewers' awareness of specific job orders to be staggered. She testified one interviewer may receive the order and begin filling it before the other interviewers learned it had come into the office.

In May 1983, Hill testified she requested a cashier referral to County Market grocery store but was told no openings were available. However, she later went to the store and learned such a position was open. Larry Hurt, a black male MSES employee, recalled the incident and stated Hill saw him that morning and requested such a referral. However, he testified he was not aware of such a

position. Hill called again that afternoon stating a white woman had been hired for the position. Although Hill lacked one year's experience in grocery checking as was required by the job order, Hurt testified he gave her a referral to County Market and Burgertown as a cashier. His failure to locate the initial order was explained as an oversight on his part.

MSES offered evidence of Hill's prior work history which showed Plaintiff held ten different positions prior to the period in question. The length of each job fluctuated between a few weeks and a few months. Her longest period of employment was from September 1979 through April 1982. From February 1979 through August 1979, Hill held two jobs at the same time.

MSES also offered evidence which showed Hill received 16 referrals between January and June 1983. Of these referrals, two were as a housekeeper, five were referrals as a counter attendant, four were referrals as a cashier and five were referrals as a waitress. Ten of the referrals occurred after April 14, 1983 and all cashier referrals occurred after this date. Although there is some dispute as to the date of referrals referred to above, the Court finds they all occurred during the relevant period.

Hill was also registered as a work incentive participant in February 1983 and was trained as a cashier-checker from April 1 through May 3, 1983. Since April 1982, Hill has been employed as follows:

(1) Maid – Ramada Inn – January 23-25, 1983;

(2) Cashier – Krystal Restaurant – June 15-July 1, 1983;

(3) Attendant – Hattiesburg Convalescent Center – June 1983-March 30, 1984;

(4) Waitress – Days Inn Hattiesburg – February 30-October 1, 1988;

(5) Waitress – Days Inn Meridian – November 1, 1988-present.

Additionally, MSES offered evidence to show Hill had personal contact with six MSES employees. Four of the employees were black, Marie Edwards and Larry Hurt, both black employees, testified race played no factor in their decisions to refer Hill to any particular job. Each denied any personality conflicts with Hill and stated referral problems such as those reflected in the Hudson's job order were isolated incidents caused by employee error as opposed to condoned or wide-spread practices by MSES. All MSES employees denied racial considerations in referral selections.

E. Statistical Evidence

Either by way of expert witnesses or through stipulations, each party offered statistical evidence reflecting the total number of referrals, referrals of 311 DOT Codes, and other such evidence in support of their cases. This evidence can be summarized as follows:

TOTAL ACTIVE FILE		WHITE		NON-WHITE	
April 1982	2518	1316	(52.2%)	1202	(47.7%)
May 1982	2593	1384	(53.3%)	1214	(46.8%)
June 1982	2940	1608	(54.6%)	1332	(45.3%)
July 1982	3470	1949	(56.1%)	1521	(43.8%)
August 1982	3683	2124	(57.6%)	1559	(42.3%)
September 1982	3243	1894	(58.4%)	1349	(41.5%)
October 1982	3707	2227	(60.0%)	1480	(39.9%)
November 1982	3855	2312	(59.9%)	1543	(40.0%)
December 1982	3517	2126	(60.4%)	1391	(39.5%)
January 1983	3463	2100	(60.6%)	1363	(39.3%)
February 1, 1983	3775	2259	(59.8%)	1516	(40.1%)
February 28, 1983	4107	2519	(61.3%)	1588	(38.6%)
OVERALL AVERAGE	3405	1984	(58.2%)	1421	(41.7%)

TOTAL BLACK/WHITE DOT CODE 311
REFERRALS APRIL 1982–FEBRUARY 1983

	WHITE	BLACK
473	255 (53.9%)	218 (46%)

* Hill denied that all 311 referrals were waiter/waitress.

The above totals reflect 95 job orders processed by MSES. Forty-one orders had more than one referral and 31 of these referrals had both black and white applicants. A total of 373 applicants were referred to these 31 job orders, 184 white (49.3%) and 189 black (50.6%). Of the entire 473 referrals in the 311 DOT Code, 233 applicants were referred out of their primary DOT Code. Of these referrals, 120 (51.5%) were white and 113 (48.4%) were black.[3]

During April 1982 through February 1983, MSES processed six identifiable cocktail waitress job orders referring 21 whites and no blacks. Four job orders referred less applicants than requested. *See* Pretrial Order ("PTO") Section 8, No. 40, page 28. Thirty-nine job orders for waitress were processed during this same period and 113 whites and 46 blacks were referred. Twenty-four of those orders referred no blacks and 14 orders referred less than the number of applicants requested. Eleven of the short referrals referred only white applicants. *See* PTO Section 8, No. 41, pages 28-29. One hundred forty-six cashier job orders were processed with 998 whites referred and 457 blacks. In 57 of the 146 job orders, MSES referred only white applicants. The total percentages of these job orders are as follows:

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[3] The information and figures discussed above were stipulations entered by the parties and made part of the pretrial order in Section 8, pages 26-28.

	BLACK REFERRALS	WHITE REFERRALS
6 cocktail jobs	0%	100%
39 waitress jobs	28.5%	71.1%
146 cashier jobs	31.4%	68.6%

See Plaintiff's Exhibit 10.[4]

In addition, Hill offered testimony from Mike Rodgers, a computer programming expert. Rodgers was hired to develop a computer program which reflected referrals in 211 and 311 codes on the basis of race. All information used to develop the program was controlled and supplied by MSES and the program was run on MSES's computers. Rodgers submitted the program to MSES for objections or suggestions for the program in order that the data compiled would reflect an accurate reference pool from which a statistical analysis could be calculated.[5] The data generated by the Rodgers program was submitted to Dr. Jerry Himmelstein, an expert in statistics.

Dr. Himmelstein testified he based his statistical analysis on two sources: (1) the actual referral pool derived from the stipulations entered by the parties and contained in the pretrial order and (2) the unreferred pool as generated by the Rodgers program. The analysis was

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[4] The totals cited above reflect total job referrals in those categories for the period April 1982 through February 1983. They do not take into account employer qualifications which may have rendered some applicants unacceptable for referral.

[5] Rodgers' program searched MSES's relevant files in order to show an applicant's DOT Code on a given date. The data generated reflects black and white unreferred applicants with either a 211 or 311 code during the relevant time period.

designed to determine whether there was a pattern of referral based on race and whether that pattern was attributable to discriminatory or non-discriminatory practice or whether the result was created by chance. Initially, Himmelstein ran the program with the entire nine digit number but it had to be inaccurate because few applicants or referrals matched the nine digit code. Instead, the program was run and data obtained based on the three digit numbers of the occupational codes. The results were factored into a formula to determine the number of standard deviations. Standard deviations determined whether the results showed a significant statistical disparity between observed referrals and expected referrals.

The following indicate the results of Himmelstein's statistical analysis of black referrals to cocktail job orders, waitress job orders and cashier job orders serviced during the applicable period as calculated using the Rodgers three digit program:[6]

JOB ORDER	STANDARD DEVIATIONS
(1) Cocktail waitress	4.83
(2) Waitress	8.78
(3) Cashier	3.41

(All standard deviations considered statistically significant.) *See* Plaintiff's Exhibit 10.

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[6] The formula used to calculate the standard deviations was approved by the Fifth Circuit in *Pegues v. Mississippi State Employment Services*, 699 F.2d 760 (5th Cir. 1983).

Finally, Himmelstein applied the formula to the Rodgers program which used the entire nine digit code and calculated the following standard deviations:

DOT CODE	STANDARD DEVIATIONS
211 Job orders	2.58
311 Job orders	1.92

See Plaintiff's Exhibit 33.

Himmelstein concluded these figures resulted in a statistically significant disparity in racial referrals. Both he and Rodgers felt the program developed by Rodgers provided an accurate pool from which a reliable statistical analysis could be conducted and Himmelstein opined that a pattern of racial disparity in referrals which disadvantaged blacks occurred during the period in question.

MSES challenged the statistical findings through testimony from Linda Monk and Dr. Mike Piette. Monk was a systems analyst employed by MSES for 19 years. She worked on the ESARS system developed by the Department of Labor to report and record placement transactions. She assisted Rodgers in formulating his program but stated MSES had never attempted to develop such a pool. She also felt Rodgers formulated the best possible program but the results did not reflect an accurate pool. Specific objections to Rodgers program interposed by MSES were: (1) applicants could change from active to inactive within one day; (2) applicant could terminate or change offices on a particular day; and (3) duplicate social security numbers would produce an inaccurate pool. Both Rodgers and Himmelstein stated these objections were of little consequence as they focused on active

transactions on a particular date in an effort to create an accurate referral pool.

Dr. Piette, an expert in labor economics and applied statistics, also testified the Rodgers pool was inaccurate regardless of whether the nine or three digit run was utilized to generate the pool. Of the two runs, Piette noted the nine digit run was more precise, thereby reflecting the better pool. Using Plaintiff's printouts, Piette found that 65.9% of all total applicants (referred or unreferred) in the 211 DOT Code were non-black and 34.1% were black. For the 311 code, the percentages were 50.1% non-black and 49.9% black. Only 13.5% of the 211 applicants received referrals while 31.5% of the 311 applicants received referrals. Of those in the 211 code, 69.2% were non-black and 30.8% were black. In the 311 code, 54.5% of referred applicants were white and 45.5% were black. The referrals by racial composition were about equal to the applicant's pool racial composition. *See* Defendant's Exhibit 6, pages 1-4. Other relevant findings showed that more blacks were classified as 211 and 311 in Forrest County than white applicants. The percentages of out-of-code referrals in the 211 and 311 DOT Codes were as follows:

CODE	BLACK	WHITE
211	32.8%	67.2%
311	47.1%	52.9%

The proportion of out-of-code referrals by race among the total referrals were as follows:

CODE	BLACK	WHITE
211	70.4%	64.3%
311	78.9%	73.9%

Based on these figures, Piette opined the procedures employed as well as the actual referrals made were neutral.

Additional problems with the Rodgers program as identified by Piette included an inability to distinguish between part-time and full-time jobs and an applicant's preference for one or the other, an inability to assign value to important factors such as education or experience and an inability to consider difficulties or inabilities to contact a particular applicant in order to apprise them of the referral. However, Piette admitted that changes in the program would only reduce the standard deviations calculated by Himmelstein and further conceded that with a .05 significance level of disparity, a standard deviation of 1.96 would be statistically significant.

Finally, Dr. Elizabeth Semko, a vocational expert, reviewed the qualifications of the 269 whites referred in 87 job orders. Of this number, she found that 39 of the job orders had white applicants referred with qualifications equal to or less than Hill. Twenty-five of the 39 job orders and white applicants referred with qualifications clearly below or less than Hill. Of the 269 applicants referred, 66 had qualifications equal to or less than Hill and 37 of those had qualifications less than Hill's. The results were based on the applicant's 511 forms and DOT Codes assigned each. Two hundred three applicants were better

qualified than Hill and were excluded from consideration. In Dr. Semko's opinion, these figures were statistically significant indicating a disparity in referrals.

F. Evidence of Retaliation

Hill also alleged that MSES retaliated against her for the March 8, 1983 filing of an EEOC complaint. In support of this claim, Hill offered proof that on March 10, 1983, she sought a waitress referral but was only referred as a maid. On that same date, Shirley Herrin, a white female, received two waitress referrals.

Additionally, Hill testified Marie Edwards tore up her identification card. Edwards recalled the incident but stated the card was destroyed and replaced with an updated card. Hill claimed she was followed and stared at by Betty Pace on April 18, 1983. Pace had no recollection of the incident but stated she had followed applicants out of the building before either unintentionally or because she needed something from the applicant.

On April 28, 1983, Hill stated she came to MSES's office at 8:00 a.m. to seek a referral to County Market grocery store but was kept waiting for over an hour and did not receive the referral until she demanded it later that afternoon.

All MSES employees denied knowledge of the incident and stated it was unusual for applicants to be kept waiting. Larry Hurt recalled the County Market referral but explained his failure to refer Hill was the result of oversight on his part rather than a retaliatory action against Hill.

Marie Edwards admitted that MSES employees were told Hill had filed a complaint but denied that it played any factor in referrals. Larry Hurt testified he was unaware of the EEOC charge at the time of the County Market incident. Charles Brown, a Work Incentive ("WIN") counselor, admitted knowledge of the suit but stated all WIN participants were treated the same and required strict compliance with the rules of the program for all participants. He denied referring to Hill's lawsuit in front of the entire WIN class. Jacqueline Jones, Hill's WIN supervisor, denied making statements about the suit. Laura Payton, a WIN participant, testified Charles Brown did comment on the suit to the class. However, Brown stated Payton asked about Hill's suit and he changed the subject.

The evidence shows that Hill received 11 referrals after she filed her EEOC complaint, including 3 cashier referrals other than the County Market incident and 3 waitress referrals. *See* PTO, Section 8, paragraph 1, pages 19-20. Hill was also registered in the WIN program during this period and receive cashier-checker training. *See* PTO, Section 8, paragraph 2, pages 20-21. In 1986, Hill received 21 referrals for MSES (16 waitress, 1 cashier). Her 511 form was altered to show added occupational codes for assembly, harness maker and sewing machine operator.

IV. APPLICATION AND CONCLUSIONS OF LAW

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, an individual plaintiff may seek recovery for alleged discriminatory acts or practices

under either the disparate treatment theory or disparate impact theory. *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Although either theory is applicable to any given set of facts, the proof under each theory differs somewhat. Under the disparate treatment theory, a Title VII plaintiff must establish discriminatory animus or intent with either direct or circumstantial evidence in order to prevail on the claim. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1980). A Title VII plaintiff seeking recovery under the disparate impact theory must simply show that an employer has utilized a facially neutral practice which impacts more severely on one group than another. *International Brotherhood of Teamsters v. United States*, 433 U.S. 321 (1977).

In an effort to facilitate an orderly presentation of proof and allocate intermediate evidentiary burdens in Title VII cases, the United States Supreme Court has established certain models of analysis to be used by courts under each theory. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972) (treatment); *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) (impact). Under the disparate treatment theory, the plaintiff must first prove by a preponderance of the evidence a *prima facie* case of discrimination. Such a *prima facie* case is established by proof that: (1) plaintiff was a member of a protected class; (2) plaintiff was qualified for an employment position sought by the defendant employer; (3) plaintiff was rejected despite his qualifications; and (4) a member of a non-protected group subsequently secured the position. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972). Plaintiff's burden is not onerous and, if he succeeds, a

presumption of unlawful discrimination results. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1980). Once plaintiff meets his burden, the defendant must rebut the presumption by articulating a legitimate non-discriminatory reason for his action. However, he need not persuade the court that the proffered reason actually motivated his decision. *Id.* at 254. If defendant succeeds, plaintiff must then establish that defendant's proffered reason is a mere pretext for discrimination. *Id.* at 256. Although this analysis entails shifting burdens, the ultimate burden of persuading the court that the plaintiff was a victim of intentional discriminations always rests with the plaintiff. *Id.* at 256.

In order to establish his *prima facie* case, a Title VII plaintiff must prove discriminatory intent by either direct or circumstantial evidence. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 797 n.11 (5th Cir. 1987), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Statistical proof is relevant in establishing plaintiff's initial *prima facie* case but is of greater significance in the third stage of a case where the Title VII plaintiff attempts to establish pretext. *Id.* at 798. However, statistical evidence must be regarded with a substantial degree of caution. *Pegues v. Mississippi State Employment Services*, 699 F.2d 760, 766 (5th Cir. 1983):

> Although competent to prove employment discrimination, 'statistics are irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances.'

Pegues, 699 F.2d at 766 (citations omitted).

In evaluating statistical evidence in disparate treatment cases, courts must carefully balance the danger of prejudice to a defendant posed by drawing inferences of discrimination from a handful of selection (referral) decisions with the unfairness to the Title VII claimant of imposing unattainable standards for proof of discriminatory intent. *Pegues*, 699 F.2d at 769. Nevertheless, such proof is valuable to the Title VII plaintiff and the defendant must offer rebuttal evidence either discrediting plaintiff's statistical evidence or establishing a non-discriminatory rationale for what appears to be discriminatory conduct. *Id.* at 766.

In contrast, disparate impact claims must be analyzed pursuant to the three-prong test established in *Griggs v. Duke Power Co.*, 401 U.S. 424 and its progeny. *See Connecticut v. Teal*, 457 U.S. 440, 444-447 (1981) (citing *Griggs*, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) and *Dothard v. Rawlinson*, 433 U.S. 321 (1977)) (three cases developing disparate impact model). Under this test, the plaintiff must first establish a *prima facie* case of discrimination by showing the employer has utilized a facially neutral employment practice which has a significant discriminatory impact on a protected group. *Teal*, 457 U.S. at 446. Such a showing requires the Title VII plaintiff to first identify the specific employment practice challenged and second "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusions of applicants from jobs, promotions or [referrals] because of their membership in a protected group. *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 2789, 101 L.Ed.2d 827 (1988). Statistical disparities must be sufficiently substantial such that they

raise an inference of causation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 (1971). No showing of discriminatory animus is required. *Pegues v. Mississippi State Employment Services*, 699 F.2d 760, 763 (5th Cir. 1983).

If the plaintiff successfully establishes his *prima facie* case, the defendant must show that the practice in question is a business necessity or based on a legitimate business reason. *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 2792, 101 L.Ed.2d 827, ___ (1988). If the defendant is successful, the Title VII plaintiff may still prevail upon a showing that the practice is a mere pretext for discrimination by showing other practices or selections devices, which do not have a similar undesirable racial effect, are available to the employer and would serve the employer's legitimate interest. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The ultimate burden of proving discrimination against a protected group caused by a specific employment practice always remains with the Title VII plaintiff. *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988).

In the present case, Hill has brought her claims pursuant to both theories thereby requiring this Court to analyze the claim under each of the aforementioned models.[7] Under the disparate treatment model, Hill must

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[7] Previous decisions from the United States Court of Appeals for the Fifth Circuit have held that employment practices relying on subjective criteria were only appropriate for analysis under the disparate treatment theory. *See Watson v. Fort Worth Bank & Trust*, 798 F.2d 791 (5th Cir. 1981); *Pegues v. Mississippi State Employment Services*, 699 F.2d 760, 766 (5th Cir. 1983); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir.

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establish: (1) membership in a protected group; (2) application and coding of an occupation for which the Hattiesburg office was making referrals; (3) failure to secure a referral; and (4) later referral of a non-member of the protected group. *See Pegues v. Mississippi State Employment Services*, 699 F.2d 760, 774 (5th Cir. 1983). The Court finds that Hill has successfully met her initial burden. In so finding, the Court relies on the evidence presented concerning the Hudson's cashier job order. All witnesses testifying stated Hill was at least minimally qualified and was appropriate for referral to this position. The job order was open during a period when Hill sought referrals as a cashier. MSES referred 22 white applicants to this job order and of those 22 referrals, 12 lacked either the minimal educational or experiential requirements. Such a glaring omission sufficiently satisfies the initial requirements established by *McDonnell Douglas* and gives rise to the inference of discrimination.

The Court's finding is bolstered by Hill's evidence of a second cashier referral order opened February 2, 1983, for which she was not referred. The job order in question sought ten referrals but only received five of which four were white. Again, Hill was coded for and sought cashier

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1982); *Pouneu v. Prudential Ins. Co. of America*, 668 F.2d 795 (1982). However, it is now clear that employment practices employing discretionary or subjective criteria may be properly analyzed under the disparate impact model. *See Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Hill's individual claim challenges MSES referral practices which utilizes some subjective factors. Thus, analysis under both models is required.

referrals during the life of this job order but was not referred. White applicants were subsequently referred and hired. Further, this job order set no minimal experience requirement and only required a 12th grade educational level. Obviously, Hill met or exceeded the minimal qualifications. Taken together both instances referred to above clearly establish a *prima facie* case as defined by *McDonnell Douglas*.

Satisfied that Hill has overcome her initial hurdle, this Court must direct its focus toward MSES's proffered non-discriminatory reason for its failure to refer Hill to the jobs in question. This inquiry is somewhat clouded as MSES does not point to a particular reason justifying the disparity. Rather, MSES contends that its referral system, while not totally perfect, is in fact racially neutral and that incidents such as those relied on by Hill are isolated occurrences resulting from numerous non-racial problems inherent in the system. Among the problems cited by MSES are: (1) employee error or oversight; (2) inefficient communication between staff members regarding active job orders and referrals made or requested; (3) inability to contact applicants; (4) applicant's preferences, including desire to work part-time or full-time; and (5) other racially neutral problems. MSES argues that the percentages of referrals compared with the racial composite of the applicant pool for each of the suspect DOT Codes show an equal referral/non-referral rate based on race. In short, they urge that the percentages prove the system to be racially neutral.

Reviewing the evidence, this Court finds MSES has satisfied its burden. The percentages of referred and

unreferred applicants is equal to the overall racial percentages found in the 211 and 311 pool. This was equally true for out-of-code referrals in both codes. Total out-of-code referrals slightly favored black applicants. Although the system was affected by the problems cited by MSES, it is apparent to this Court that the system appears facially to be racially neutral.

Moreover, MSES'S complaints about inherent, non-racial problems affecting the referral system are legitimate, non-discriminatory reasons in the context of *McDonnell Douglas*. MSES serves a large number of applicants and employers in any given period. The testimony reflects the office is often crowded with applicants seeking employment referrals. The size of the staff, on the other hand, is relatively small when compared to the applicants. Problems cited by MSES are inevitable in any sort of business organization. This would be especially true where the operation is undermanned. While these problems obviously affect referrals and ultimately lead to some disparities in referrals, they are not necessarily discriminatory acts. Finally, they are legitimate problems encountered in the daily operations of MSES. Thus, MSES has sufficiently articulated a legitimate non-discriminatory reason for the acts.

The burden of proof now shifts back to Hill to offer proof that the reasons advanced by MSES are merely a pretext to discrimination. In so doing, Hill has offered statistical evidence utilizing a standard deviation to show that the referral of less blacks was not attributable to

chance but rather the produce of discrimination.[8] The statistical proof offered is questionable. As noted, two critical factors, educational level and experience, could not be factored into the programs. Both of these factors are vital to any job order and will drastically affect any given applicant's eligibility for any referral. Additional factors not included are the applicant's preference for full or part-time work, his or her preference for day or night-time work, and other job preference factors. Similar problems were encountered in *Pegues v. Mississippi State Employment Services*, 699 F.2d 760 (5th Cir. 1983). In *Pegues*, the United States Court of Appeals for the Fifth Circuit rejected statistical proof offered by plaintiff in a Title VII case alleging racial bias in referrals because no consideration was given the experiential component of the referral decision. *Pegues*, 699 F.2d at 770. Guided by this decision, this Court finds Hill's statistical proof to be flawed and insufficient to prove pretext.

The testimony of MSES's officials and employers reflects that experience, education and applicant's job preference are critical factors relied on in any referral decision. Because these factors are so crucial to any referral decision, statistics reflecting disparity in referrals which do not or cannot consider these factors are suspect. Obviously, consideration of these factors would render some applicants ineligible for referrals. This would affect the size of the applicant pool on which the statistical

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[8] Although Hill offered statistical proof at both stages of the case, it was unnecessary to consider that proof in the *prima facie* case, as the direct incidents referred to proved sufficient to overcome the initial burden.

analysis was based and would affect the calculations of the standard deviations. Were this court to rely on such statistics, a finding of racial bias in referral would prove tainted as due consideration could not be given to those critical factors. The numbers would be misleading and reliance thereon would prove prejudicial and unfair. Therefore, this Court finds the statistical proof offered by Hill to be so flawed that any suggestion of statistical significance in referrals based on race is insufficient to support Hill's claim of racial discrimination. As such, the Court finds that Hill has failed to establish a violation of Title VII on the theory of disparate treatment.

Finding no disparate treatment, this Court must now consider Hill's claim of disparate impact. Hill has identified the specific employment practice challenged as being a referral system where subjective traits and out-of-code referrals are used in referrals. She thus has succeeded in the first step of establishing her *prima facie* case. Hill is now required to offer statistical proof to support her claim that the practice in question has a significant impact on a protected group. She relies on the same figures asserted to overcome pretext in her claim of disparate treatment.

Evaluating the proof in question, this Court is again led to conclude that Hill has failed to offer sufficient proof to overcome this burden. The statistical proof is clearly flawed based on its inability to consider educational and experiential factors critical to a referral decision. Racial disparity reflected by these figures is suspect, unreliable and insufficient as proof a racial disparity necessary to overcome the initial burden under the disparate impact mode. Accordingly, the Court finds that Hill has

failed to establish a violation of Title VII under either theory and, therefore, is not entitled to relief on her claims.

Although no Title VII violation has been substantiated, this Court is inclined to voice its observation about the referral system employed by MSES. The aforementioned problems obviously result in some disparity in referrals. Inadequate communication between MSES's staff members ultimately cause some qualified applicants to slip through the cracks and miss employment opportunities. Inability to communicate with qualified applicants often results in referrals going either to walk-in applicants readily available or out-of-code applicants who satisfy the job requirements. Such practices ultimately result in unfair referrals though not necessarily racially biased referrals. Of course, these areas of concern are tempered by other considerations such as MSES's inability to refer every eligible applicant to a particular job order. Consideration of the applicant's job preference obviously factors into any referral decision. Nevertheless, additional measures could be taken to open better lines of communication between staff members to ensure that qualified applicants in the appropriate DOT Code received preference over all other applicants.

This does not imply that MSES has failed to recognize these problems and take steps to correct them. The staff has been enlarged in correlation to the demand for services. Efforts have been undertaken to provide a racially equal staff to help applicants. Staff meetings focusing on these problems inform staff members of the problems and provide avenues for suggestions toward improvement. Such measures are not only needed but

must be routinely employed to avoid disparity in referrals. Additional measures might also be instituted. However, it is unnecessary for this Court to speculate as to what type of measures should be employed.[9] In short, the system employed is flawed and measures should be taken to alleviate the problem inherent in the system. However, Title VII does not require employment agencies to provide perfect referral systems, only systems which do not discriminate. The evidence here fails to establish either discriminatory treatment or impact.

One final point need be discussed. Much of Hill's complaint centered around MSES's referral clerk's use of subjective factors in referral decisions. Subjective or discretionary factors are normally associated with business operations regarding referral, hiring or promotional decisions. Obviously, they play important roles in business decisions as management seeks to hire or promote the best qualified personnel. Use of subjective criteria is not prohibited *per se* by Title VII. Title VII is only violated when an employer or employment agency utilizes subjective criteria as a vehicle for discrimination. In the present case, Hill received referrals from both black and white employees of MSES. Although each stated they utilized personal judgment when referring an applicant, all denied race as a factor considered in the referral decision. The racial composition of MSES's referral staff diminishes any inference, expectation or presumption that the use of

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[9] Interestingly, Hill offered no proof as to an alternative system available which would be better with regard to referrals or that would provide a more equal rate of referrals.

subjective criteria is necessarily indicative of discriminatory animus or impact. Again, the Court does not wish to imply that it recommends and approves the use of such criteria. On the contrary, the referral decision should be based primarily on objective factors. Subjective factors may be considered but strict reliance on them should be avoided. Under the circumstances of this case, this Court is unwilling to find that the use of subjective criteria by MSES's employees was a mask for discriminatory treatment of Hill.

Finally, the Court must examine Hill's claim of retaliation. In order to prevail on such a claim, Plaintiff must prove: (1) she engaged in an activity protected by Title VII; (2) an adverse employment action occurred; (3) there was causal connection between protected activity and an adverse employment decision. *McMillan v. Rust College, Inc.*, 710 F.2d 112 (5th Cir. 1983). In this case, Hill claims her filing of the EEOC complaint resulted in harassment by MSES employees in the following forms: (1) staring and following by MSES employees; (2) inefficient service by being made to wait for long periods of time before securing a referral clerk; (3) being required to use only black referral clerks; (4) destruction of identification card; (5) deletion of pertinent experience data from 511 form; and (6) criticism of the claim to a WIN class. As a result of these acts, Hill contends she was hospitalized and ultimately missed some referrals.

Based on the evidence presented at trial, the Court finds this claim lacks merit. MSES employees denied staring, following or making the Plaintiff wait inordinate periods of time for service. This testimony is credible and only contradicted by Hill's bare allegations. There is no

evidence, other than Hill's statement, that important data was deleted from the 511 form. The destruction of the identification card was the result of replacement rather than retaliation. A new identification card was provided. Regarding the alleged statements criticizing Hill's suit which were allegedly made to a class of WIN students, the testimony is unclear as to whether the statements actually occurred or the nature of these statements if in fact they occurred. Regardless, there is no testimony to indicate any statements were made in retaliation to Hill's filing of the Complaint. In fact, it appears that Hill received numerous referrals and continued services after the complaint was filed. Accordingly, the Court finds Hill is not entitled to relief on this claim.

V. CONCLUSION

Based on the evidence adduced at trial, this Court is of the opinion that Plaintiff Hill has failed to present sufficient evidence in support of her claims for relief. The system used by MSES is racially neutral but not immune from disparity. Problems inherent in the system create some disparities in referrals. These disparities are not products of intentional discrimination nor discrimination resulting from a neutral process operated in a discriminatory fashion. Thus, no violation of Title VII has occurred and it is the decision of this Court that Plaintiff's claims should be dismissed with prejudice. A judgment consistent with this opinion shall be submitted to the Court

within ten (10) days of the entry of this Memorandum Opinion.

THIS, the 28th day of April, 1989.

/s/ Britt Singletary
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

HAZEL HILL — PLAINTIFF

VS. — C.A. NO. H83-0281(W)

MISSISSIPPI STATE EMPLOYMENT SERVICE, HATTIESBURG DIVISION; MISSISSIPPI EMPLOYMENT SECURITY COMMISSION; O.H. SIMMONS, EXECUTIVE DIRECTOR; HUGH GIBSON, WILLIAM G. LEONARD, AND MARY BRYANT, COMMISSIONERS — DEFENDANTS

FINAL JUDGMENT

(Filed May 11, 1989)

In accordance with the Memorandum Opinion of the Court filed in this case on May 1, 1989, it is ORDERED;

1. Judgment is hereby entered in favor of the defendants and against the plaintiff on all claims of discrimination alleged by the plaintiff in the Third Amended Complaint. Such claims are accordingly dismissed with prejudice.

2. Costs are to be paid by plaintiff.

ORDERED, ADJUDGED, AND DECREED:

DATED: May 10th, 1989.

/s/ Britt Singletary
UNITED STATES
MAGISTRATE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 89-4438

HAZEL HILL,

Plaintiff-Appellant,

VERSUS

MISSISSIPPI STATE EMPLOYMENT SERVICE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Mississippi

(April 15, 1991)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before RUBIN and DAVIS, Circuit Judges.[1]

Judge Rubin would grant the petition; Judge Davis would deny the petition. Because the panel is equally divided, the petition is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

[1] Judge Thomas Gibbs Gee was a member of the original panel but resigned from the Court on February 1, 1991.

ENTERED FOR THE COURT:

/s/ W. EUGENE DAVIS
United States
Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.